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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, and
KENTLAND-ELKHORN COAL CORPORATION,
*Petitioners,*

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

and

UNITED MINE WORKERS OF AMERICA,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

The Court of Appeals for the District of Columbia Circuit has, in this case, quite flagrantly overstepped the bounds of the judiciary's role and intruded upon the province of the legislature to achieve a result it believed Congress should have legislated, but in fact did not, with respect to the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* (Supp. IV 1980) ("Mine Act"). The panel majority held that the right of miners to be compensated for accompanying federal inspectors during mine inspections extends to all types of inspections, including spot inspections required by Section 103(i) of the Mine Act. 30 U.S.C. § 813(i). To achieve this result, the court rendered meaningless the limitation found in Section 103(f) that the "walkaround pay right"[1] attaches only to inspections conducted "pursuant to the provisions of subsection (a)." 30 U.S.C. § 813(f).

In extending the walkaround pay right to spot inspections, the court completely ignored the only relevant and explicit legislative history pertaining to Section 103(f). This legislative history is clear, uncontradicted and authoritative, and the court's refusal to consider it directly conflicts with the teachings of this Court that dispositive legislative history, when available, must *always* be consulted to interpret statutory language properly. The court also rejected the reasoning and compelling authority of the contrary decision of the Federal Mine Safety

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[1] The "walkaround pay right" refers to the statutory right of miners' representatives to be compensated for accompanying federal inspectors on inspections "made pursuant to the provisions of subsection (a)." Section 103(f), 30 U.S.C. § 813(f).

and Health Review Commission.[2] This refusal to accord *any* deference to the Commission's decision stripped the Commission of the policymaking and adjudicative functions for which Congress explicitly had created the Commission and established a conflict with courts of appeals that have accorded substantial deference to decisions of federal safety and health review commissions.

The reason for the court's refusal to abide by the legislative history and the Commission's decision is clear. Both the legislative history and the Commission unequivocally resolved the walkaround compensation issue so as to limit the walkaround pay right to regular inspections[3]—a result the court felt was contrary to what Congress should have legislated. The court's opinion in

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[2] The Federal Mine Safety & Health Review Commission ("Commission") is an independent agency created by Congress to establish a consistent body of law interpreting the Mine Act and its implementing regulations. Section 113, 30 U.S.C. § 823. The Commission was named Respondent in the proceedings before the court of appeals but declined to participate actively in the proceedings and instead relied on its decision. The other parties before the court of appeals were the Secretary of Labor (originally Ray Marshall and now Raymond J. Donovan) and the United Mine Workers of America as Petitioners. The Helen Mining Company, Kentland-Elkhorn Coal Corporation and Allied Chemical Corporation appeared as Intervenor-Respondents. The Helen Mining Company and Kentland-Elkhorn Coal Corporation are petitioning for this writ of certiorari. A list of the parents, subsidiaries and affiliates of The Helen Mining Company and Kentland-Elkhorn Coal Corporation appear as Appendix P.

[3] The term "regular" inspection has been used throughout the litigation by all parties to indicate the four full inspections of underground mines required each year by Section 103(a). The term "spot" inspection has been similarly used and refers to all inspections that are not regular inspections, such as those required by Section 103(i).

this case violated clear Supreme Court precedent, created a conflict among the circuits, and eviscerated the statutory scheme with respect to the Commission's role under the Mine Act. The decision should be reversed.

Petitioners seek review of the following questions:

1. Whether the court of appeals' decision ignoring clear, authoritative, and dispositive legislative history in the face of an ambiguous statute was contrary to this Court's numerous holdings that legislative history is always relevant to discerning the meaning of a statute.
2. Whether the court of appeals erred in refusing to grant any deference to the decision of the Federal Mine Safety and Health Review Commission, the expert agency Congress created to interpret the Mine Act.

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THE HELEN MINING COMPANY, and
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on February 23, 1982. Petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied on April 9, 1982.

### PRIOR OPINIONS

The court of appeals consolidated appeals by the United Mine Workers of America and Secretary of Labor

("Secretary") of three Commission decisions involving respectively The Helen Mining Company, Kentland-Elkhorn Coal Corporation, and Allied Chemical Corporation. The court's decision on these consolidated cases, from which Petitioners request this writ of certiorari, is *United Mine Workers of America v. Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) and appears as Appendix A.

The decision of the Commission in the *Helen* Case, *Secretary of Labor v. The Helen Mining Co.*, is reported at 1 FMSHRC 1796 (1979) and appears as Appendix B. The decision of the Commission in *Kentland-Elkhorn Coal Corp. v. Secretary of Labor* is reported at 1 FMSHRC 1833 (1979) and appears as Appendix C. The decision of the Commission in *Secretary of Labor on behalf of Arnold J. Sparks, Jr. v. Allied Chemical Corp.* is reported at 1 FMSHRC 1947 (1979) and appears as Appendix D.

The decision of the Administrative Law Judge in *Secretary of Labor v. Helen Mining Co.* is reported at 1 FMSHRC 219 (1979) and appears as Appendix E. The decision of the Administrative Law Judge in *Kentland-Elkhorn Coal Corp. v. Secretary of Labor* is reported at 1 FMSHRC 89 (1979) and appears as Appendix F. The decision of the Administrative Law Judge in *Secretary of Labor on behalf of Arnold J. Sparks, Jr. v. Allied Chemical Corp.* is reported at 1 FMSHRC 1451 (1979), and appears as Appendix G.

## JURISDICTION

The judgment of the court of appeals, entered on February 23, 1982, appears as Appendix H to this petition. The orders of the court denying Petitioners' timely petition for rehearing and suggestion for rehearing *en banc*,

entered on April 9, 1982, appear as Appendix I. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

## STATUTES INVOLVED

This case involves the following provisions of the Mine Act:

1. Section 103(f), 30 U.S.C. § 813(f) (Supp. IV 1980), which appears as Appendix J;
2. Section 103(a), 30 U.S.C. § 813(a) (Supp. IV 1980), which appears as Appendix K; and
3. Section 103(i), 30 U.S.C. § 813(i) (Supp. IV 1980), which appears as Appendix L.

## STATEMENT OF THE CASE

The statutory right involved in this case is the right of miners under Section 103(f), 30 U.S.C. § 813(f), to be compensated for the time spent accompanying Mine Safety and Health Administration ("MSHA") inspectors during their inspections of the nation's mines. Section 103(f) requires mine operators to compensate miners for participating in inspections that are "made pursuant to the provisions of subsection (a)." Section 103(a) provides for comprehensive inspections of all underground mines through a minimum of four regular inspections per year. 30 U.S.C. § 813(a).

The Mine Act also provides for certain other inspections apart from the regular inspections conducted pursuant to subsection (a). In the *Helen Mining* case, for example, MSHA conducted an inspection pursuant to

Section 103(i),[4] which authorizes special spot inspections of mines that release certain levels of methane gas.[5] To be distinguished from Section 103(a) regular inspections, Section 103(i) spot inspections are announced as separate inspections (Hearing Transcript in the *Helen Mining* case ("Tr.") at 35-36); they are recorded by MSHA as separate inspections (Appendix N); and they are described as different inspections by MSHA (Appendices M, N, O[6]). Unlike regular inspections, which cover every aspect of health and safety in the mine[7] and may require weeks or

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[4] Other examples of spot inspections include: Section 103(g)(1) spot inspections in response to certain requests by miners or their representatives; inspections under Section 202(g) authorizing the Secretary to make frequent spot inspections of the active workings of coal mines for compliance with respirable dust regulations; and inspections under Section 303(x) requiring the Secretary to inspect an entire coal mine prior to reopening previously abandoned or inactive portions of the mine. *See* 30 U.S.C. §§ 813(g)(1), 842(g), 863(x).

[5] The *Allied Chemical* case also involved a Section 103(i) spot inspection, while the *Kentland-Elkhorn* case involved a specialized electrical inspection required by MSHA.

[6] Appendices M, N and O are exhibits RX-1, RX-2 and RX-3 from the administrative hearing in the *Helen* case.

[7] Regular inspections include:

1. inspection of all active areas: the working faces, all travelways, air courses, and haulageways, such as belt haulages, track haulages and off-track haulages;
2. electrical inspection of the entire underground distribution system;
3. all surface areas;
4. preparation plant facilities, if any;
5. bathhouses;
6. checks on all record books;

months to complete,[8] the focus of a Section 103(i) spot inspection is limited to detecting only one hazard—excessive methane. As in the *Helen* case, the inspection is generally confined to conducting two limited tests, a test to measure methane with a methanometer and a test to measure air velocity with an anemometer (Tr. 19-20).

In both the *Helen* and *Kentland-Elkhorn* cases, miners' representatives were permitted to accompany MSHA inspectors on their respective spot inspections, but were not paid for the time spent with the inspectors. The inspectors subsequently issued citations and orders, which alleged that Petitioners' failure to compensate miners' representatives violated Section 103(f). Helen and Kentland-Elkhorn then sought administrative review of the orders before the Federal Mine Safety and Health Review Commission.[9] Both Administrative Law Judges

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7. such tests as respirable dust surveys, noise level surveys, rock dust surveys, rock dust samples, bottle sampling of air for methane and other gasses; and

8. checks on all required plans, such as roof control plans (Tr. 35).

In short, the inspector must check for compliance with over one hundred fifty pages of mandatory health and safety regulations that apply to coal mines alone. *See* 30 C.F.R. Parts 70 and 75 (1981).

[8] A regular inspection at the Helen mine normally requires 3 full months to complete.

[9] On April 25, 1978, the Secretary issued an Interpretive Bulletin that construed Sections 103(f) and 103(a) of the Mine Act as establishing a compensation right for every spot and regular inspection. 43 Fed. Reg. 17546 (1978). The first challenge to the Secretary's Interpretative Bulletin was brought by a trade association in federal court. Judge Gesell of the District Court for the District of Columbia, however, dismissed the complaint, in part, to permit the Commission

assigned to the cases rejected MSHA's interpretation of the Mine Act. [10] Appendices E and F.

On appeal from the *Helen* case the Commission affirmed, with two Commissioners dissenting, and held that miners were entitled to walkaround pay only with respect to the comprehensive regular inspections. [11] The Commission determined that the statute was ambiguous, but that the legislative history conclusively resolved the issue. The Commission relied specifically on a statement by Representative Carl D. Perkins, chief House sponsor of the Mine Act, chairman of the committee that reported the bill, and chief House conferee, who clearly explained that the walkaround pay right applied only to regular inspections. The Commission subsequently applied the *Helen* precedent to achieve a similar result in the *Kentland-Elkhorn* case.

The court of appeals reversed these rulings in a 2-1 decision, with Judge Tamm issuing a vigorous dissent. [12] The panel majority ruled that the Commission erred in even considering the legislative history because the statutory language was so clear. In his dissent, Judge Tamm concluded it was "difficult to believe that any objective reader could fail to conclude that subsections 103(a) and (f) are so ambiguity-ridden as to call out for

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to exercise its expertise in reviewing the Secretary's interpretation. *Bituminous Coal Operators' Ass'n v. Marshall*, 82 F.R.D. 350 (D.D.C. 1979).

[10] The Administrative Law Judges had jurisdiction over these cases under Section 113(d)(1), 30 U.S.C. § 823(d)(1).

[11] The jurisdiction of the Commission over the appeal is conferred by Section 113(d)(2)(A), 30 U.S.C. § 823(d)(2)(A).

[12] The jurisdiction of the court of appeals is conferred by Section 106(a)(1), 30 U.S.C. § 816(a)(1).

clarification." Appendix at 40a. Therefore, Judge Tamm turned to the legislative history and found that Representative Perkins's statement "was clear, directly on point, and prepared with great care; equally important, there is not the slightest contradiction of the details of his remarks at any place in the legislative history." Appendix at 43a-44a.

Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. The court denied these requests on April 9, 1982.

## REASONS FOR GRANTING THE WRIT

### I. The Court Of Appeals' Decision Is In Direct And Irreconcilable Conflict With The Explicit Directions Of This Court.

The panel majority ruled that the Commission "erred in even considering" the only relevant legislative history on the issue raised in this case. Appendix at 15a. That legislative history is a lengthy statement delivered by Representative Carl D. Perkins to the full House immediately before the House adopted the Mine Act. Representative Perkins was a major proponent and the chief House sponsor of the Mine Act, the chairman of the House Committee that reported the bill to the House floor, the chairman of the Joint Conference Committee that produced the final version of the bill, and, as the Commission recognized, one of the leading figures in the development and passage of mine safety and health legislation in Congress. Appendix at 60a, 43a.

Representative Perkins appeared before the House in his official role as the representative of the Joint House-Senate Conference Committee to report on the conference version of the bill and to interpret the agreement reached by the House and Senate conferees. In reporting

the conclusions of both the Senate and House conferees, Representative Perkins stated:

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.
>
> * * * *
>
> Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). *Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector*, including pre- and post-conferences, at no loss of pay *only during the four regular inspections of each underground mine* and two regular inspections of each surface mine in its entirety, including pre- and post-inspection conferences.
>
> * * * *
>
> Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 act, [13] but, rather to an inspection of any mine pursuant to subsection (a), *it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act.*

123 Cong. Rec. 35,410 (daily ed. Oct. 27, 1977), *reprinted in* Subcom. on Labor of the Senate Committee on Human

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[13] The 1977 Mine Act amended the Federal Coal Mine Health and Safety Act of 1969 ("1969 Act"). Pub. L. No. 91-173, 83 Stat. 747.

Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) ("Legislative History") at 1356-58 (emphasis added).

This authoritative statement by the leading House advocate for mine safety and health legislation was entirely ignored by the panel majority on the ground that the statute is unequivocally clear. The majority's ruling is in direct conflict with the explicit and repeated directions of this Court. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("the plain meaning rule is 'rather an axiom of experience rather than a rule of law, and does not preclude consideration of persuasive evidence [of a contrary statutory meaning].' "); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976) (where legislative history is available, "there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "); *see also Woelke & Romero Framing, Inc. v. NLRB*, 50 U.S.L.W. 4538, 4540 (1982) (even apparently unambiguous statutory language "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment.' "); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("clearly expressed legislative intention" may override otherwise clear statutory language); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1955) (the " 'plain meaning rule' . . . has not dominated our decisions. The contrary doctrine has prevailed."); *see generally* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299 (1975).

The panel majority did not seek to discredit the remarks of Representative Perkins by reference to other indicia of legislative intent, nor did it find more persua-

sive comments elsewhere in the legislative history. Quite the contrary, the court failed to consider Representative Perkins's remarks *at all*. Such disregard for explicit and authoritative legislative history flatly conflicts with the instructions of this Court.

Moreover, the Mine Act is so far from being unambiguous that Judge Tamm found it "difficult to believe that any objective reader could fail to conclude that subsections 103(a) and (f) are so ambiguity-ridden as to call out for clarification." Appendix at 40a. This view is supported by the following facts:

(1) the panel majority itself acknowledged that its interpretation was not "entirely unflawed" and that the statutory language contained "possible ambiguities," Appendix at 25a n.43;

(2) three of the five Commissioners disagreed with the panel majority's reading of the supposedly clear language of the Mine Act, *see* Appendix B;

(3) the two dissenting Commissioners filed separate opinions and dissented from the Commission majority on the basis of two entirely different readings of this same language, *Id.*;

(4) two out of three administrative law judges to consider the issue disagreed with the panel majority's reading of the Mine Act, *see* Appendices E, F and G;

(5) the panel majority admitted that the phrase "made pursuant to" (which governs the scope of the walkaround pay right) is ambiguous (Appendix at 13a, 18a), thereby acknowledging that the scope of the walkaround pay right is, by necessary implication, ambiguous.

If Congress had intended the walkaround pay right to apply to all inspections, then it could easily have used the phrase "any inspection" in Section 103(f) instead of refer-

ring to an inspection "made pursuant to the provisions of subsection (a)," the language actually chosen. In other sections of the Mine Act where Congress intended a provision to apply to all inspections, Congress specifically used the term "any inspection."[14] The reference in Section 103(f) to inspections that are "made pursuant to the provisions of subsection (a)" is therefore superfluous unless it is interpreted to limit the walkaround pay right in some manner.[15]

These statutory inconsistencies demonstrate the accuracy of Judge Tamm's comment that "no law professor will ever use the FMSA as a model of draftsmanship. . . ." Appendix at 36a. In this case, the statutory meaning cannot be satisfactorily resolved on the face of the Mine Act itself. It is in precisely this type of situation that resort to the legislative history is critical.

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[14] Congress used the phrase "any inspection" in the following sections:

Section 103(a), 30 U.S.C. § 813(a);
Section 103(g)(2), 30 U.S.C. § 813(g)(2);
Section 104(d)(1), 30 U.S.C. § 814(d)(1);
Section 104(d)(2), 30 U.S.C. § 814(d)(2);
Section 104(e)(1), 30 U.S.C. § 814(e)(1);
Section 104(e)(2), 30 U.S.C. § 814(e)(2);
Section 107(a), 30 U.S.C. § 817(a).

[15] This conclusion is reinforced by Congress's provision for certain spot inspections in subsections of Section 103 other than subsection (a). *E.g.*, Sections 103(g)(1), 103(i), 30 U.S.C. §§ 813(g)(1), 813(i). If Congress had intended Section 103(f) to apply to all inspections, it would not have referred specifically to subsection (a) alone. Congress would at least have referred to any inspection made "pursuant to Section 103," as it did in Section 104(g)(1). 30 U.S.C. § 814(g)(1). That Congress chose to limit Section 103(f) to only those inspections made pursuant to subsection (a) must indicate that the walkaround pay provision applies to something less than all inspections. The panel majority's decision fails to address this crucial inconsistency.

The only legislative history on point is the statement of Representative Perkins. This statement is unambiguous, authoritative, and directly resolves the issue in this case. Representative Perkins spoke not as a single legislator, but as the chairman of the House committee that reported the bill and the leader of the House conferees who revised the bill. Representative Perkins spoke on behalf of the joint conference committee to explain the meaning of the bill to the full House immediately prior to the final vote on the bill. It is well settled that statements on the floor by the committee member in charge of a bill "are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports." 2A Sutherland on Statutory Construction § 48.14 at 220 (4th ed. 1973); *see also* Appendix at 43a. Representative Perkins's statement falls precisely within this category and, as such, is due the greatest deference.

To avoid the devastating effect of this legislative history on the result the panel majority wanted to reach, the panel majority had to argue that Representative Perkins's statement was unreliable. The panel majority could not point to the usual indicia of unreliability, such as the ambiguous or unauthoritative nature of the statement in question, for Representative Perkins's statement was clear, directly on point and based on Representative Perkins's experience as the House sponsor of the 1977 and 1969 Acts. Rather, the panel majority focused on the timing of Representative Perkins's statement. The majority contended that because the statement was made to the House after the Senate had adopted the bill, the statement could not reflect the will of the Senate. As Judge Tamm wrote in his dissent, the panel majority's rationale on this point was "peculiar" in light of the legislative process itself. Appendix at 42a. One House

always acts before the other, but such action does not and cannot deprive the other of commenting authoritatively on the meaning of a statute before it. Representative Perkins was speaking on behalf of the entire House-Senate conference committee and thus represented the views of both the Senate and the House members who were responsible for the final bill.

Because it was familiar with the Mine Act's sponsors, the Commission knew that Representative Perkins was the leading House advocate of miners' rights and accorded his statement substantial weight.[16] As chief House conferee and chairman of the House Committee on Education and Labor which considered the House bill, Representative Perkins was in the best position to speak authoritatively both as to what the conferees intended and as to mine safety and health issues generally.[17] The

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[16] The Commission also noted that Representative Perkins was the principal sponsor of both the 1969 and 1977 Acts, the chairman of the House Committee on Education and Labor during the consideration and passage of both Acts, and the chief House conferee when both statutes were finalized in conference committee. Appendix at 60a.

[17] The panel majority cited various cases to suggest that Representative Perkins's statement should not be read as reflecting the intent of the entire Congress. *See Department of the Air Force v. Rose*, 425 U.S. 352, 365-66 (1976); *Jordan v. Department of Justice*, 591 F.2d 753, 767-71 (D.C. Cir. 1978); *Vaugh v. Rosen*, 523 F.2d 1136, 1142-43 (D.C. Cir. 1975). In those cases, however, there was a direct conflict between two parts of the legislative history and clear extrinsic evidence of efforts taken to taint the legislative history. In this case, no such conflict or evidence exists; Representative Perkins's statement is the only legislative history that is on point.

Moreover, this clearly is not a case where a special interest group surreptitiously inserted a self-serving statement into the legislative record. *See National Small Shipments Traffic Conf., Inc. v. CAB*, 618 F.2d 819, 828 (D.C. Cir. 1980). Instead, as the Commission and

panel majority's decision to ignore Representative Perkins's clear statement on the precise issue in this case is indefensible and should be reversed.

**II. By Concluding That The Commission's Decision Was Entitled To No Weight, The Court Of Appeals Created A Conflict Among The Circuits And Eviscerated The Congressional Scheme That Established The Commission As The Authoritative Source On Matters Of Policy And Statutory Construction Under The Mine Act.**

The panel majority did not simply ignore the leading House advocate on mine safety and health legislation, it also ruled that

> the Commission's construction [of Section 103(f)] is plainly incorrect and unsupportable by the terms of the Act and therefore entitled to *no* deference.

Appendix at 17a n.26 (emphasis added) (citation omitted). What the court found "plainly incorrect and unsupportable," however, was not the *holding* of the Commission, but rather additional *dictum* on a separate issue never raised by any party and addressed for the first time *sua sponte* by the Commission. The Commission held that the phrase "pursuant to the provisions of subsection (a)" limited a miner's walkaround *pay* right, but the Commission felt compelled to add that miners were still entitled to

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Judge Tamm explicitly recognized, Representative Perkins was the foremost House spokesman in favor of strict mine safety and health laws. Representative Perkins would have been the last person in the House to attempt to subvert the Mine Act through legislative chicanery. *See* Appendix at 60a, 43a.

accompany inspectors without pay on any inspection. The latter conclusion was unquestionably *dictum*. [18]

The court of appeals seized on this *dictum* to disregard entirely the Commission's *holding*. The only necessary elements of the Commission's holding were the following:

(1) the Commisson concluded that the phrase, "pursuant to the provisions of subsection (a)" was ambiguous, a conclusion with which the court expressly agreed (Appendix at 13a, 18a);

(2) the Commission concluded that authoritative and dispositive legislative history was available to resolve the ambiguity, a conclusion which the court could not contest.

Had the Commission stopped there, its decision unquestionably would have been entitled to deference and the court would have had no basis on which to disagree. But, because the Commission felt compelled to address a further issue in *dictum*, the Commission's total-

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[18] By commenting that the walkaround right extended to all inspections authorized by the Mine Act, the Commission bifurcated the scope of the walkaround right and the walkaround pay right. The panel majority vigorously disputed this aspect of the decision and devoted an entire section of its opinion to the co-extensiveness question. The scope of the walkaround right, however, has never been an issue in this case. Neither Helen nor the other intervenor-defendants contested the right of a miner to accompany inspectors on spot inspections. Indeed, the issue is unlikely ever to arise because the wage agreement between the miners and mine operators provides for a walkaround right on all inspections.

ly reasonable resolution of the only issue before it was completely ignored.[19]

By failing to give any deference to the Commission's construction of the Mine Act, the court's decision is in direct conflict with decisions of the Fourth, Sixth and Eighth Circuits. Those circuits, in addressing the statutory interpretations of the Commission's sister commission under the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* (1976),[20] have held that reasonable commission decisions are entitled to great deference, even if they conflict with interpretations of the Secretary. *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir. 1978); *Marshall v. Knutson Construction Co.*, 566 F.2d 596 (8th Cir. 1977); *Dunlop v. Rockwell International*, 540 F.2d 1283 (6th Cir. 1976); *Brennan v. Gilles &*

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[19] The Commission's *dictum* was itself supported by legislative history, including other statements by Representative Perkins. Recognizing that the statute contained a possible drafting error, but that the legislative intent was clear, the Commission decided to follow the unambiguous legislative history in all respects and thereby resolve whatever inconsistencies existed in Section 103. Appendix at 57a-59a.

[20] When Congress set out to amend the 1969 Act, one of its principal objectives was to create an independent commission that would assume adjudicative functions under the Mine Act. Under the 1969 Act, these duties had been delegated by the Secretary of the Interior to a non-independent body, the Interior Board of Mine Operations Appeals. Congress rejected this approach and instead followed the scheme of the Occupational Safety and Health Act which created an independent commission for adjudicative and policymaking functions and committed the rulemaking and enforcement functions to the Secretary of Labor. Congress transferred authority over the Mine Act from Interior to the Department of Labor and created the Commission to provide an expert independent body for interpreting and reviewing the Secretary's actions in implementing the Mine Act.

*Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974); *see also Bratton Corp. v. Occupational Safety and Health Review Commission*, 590 F.2d 273 (8th Cir. 1979).

The reasons for this deference were well-stated in *Brennan v. Gilles & Cotting, Inc.*, *supra*. That case involved the Occupational Safety and Health Review Commission ("OSHRC"), an agency comparable in all relevant respects to the Commission.[21] The court pointed out that "[t]he statute vests adjudicatory functions in the [OSHRC]" and that "Congress deliberately created the [OSHRC] separate and independent of the Secretary." 504 F.2d at 1262. The court explained that "Congress . . . created a specialized agency and spelled out in the statute itself that it would be composed of persons specifically qualified 'by reason of training, education, or experience.' " *Id.* (citation omitted). The court concluded that "the [OSHRC] was designed to have a policy role and its discretion therefore includes some questions of law." Otherwise, the OSHRC would be "little more than a specialized jury, an agency charged with fact finding." *Id.*

Precisely the same factors dictate deference to the Commission's construction of the Mine Act. Like the OSHRC, the Commission is an independent adjudicative body with an express policy role. Congress specifically empowered the Commission to review not merely questions of substantial evidence, but erroneous legal conclusions, "substantial questions of law, policy or discretion," (Section 113(d)(2)(A)(ii), 30 U.S.C. § 823(d)(2)(A)(ii)), and "novel" questions of policy (Section 113(d)(2)(B), 30 U.S.C. § 823(d)(2)(B)). Congress

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[21] Both the OSHRC and the Commission review actions taken by the Secretary of Labor to enforce health and safety laws.

chose an expert adjudicative body comprised of Commissioners selected "by reason of training, education, or experience." Section 113(a), 30 U.S.C. § 823(a). Thus, Congress created the Commission to "develop a uniform and comprehensive *interpretation* of the law," which would guide both mine operators and the Secretary of Labor in understanding what the Mine Act required. *Nomination Hearings, Members of Federal Mine Safety and Health Review Commission, Before the Senate Committee on Human Resources*, 95th Cong., 2d Sess., 1 (1978) (emphasis added).

The court dodged the need to pay deference to the Commission, however, by creating a false issue. On the basis of its claimed inability to accept the Commission's dictum, the panel majority bootstrapped itself into disregarding the Commission's holding. This stratagem effectively stripped the Commission of the legal and policymaking roles Congress intended the Commission to have [2] and relegated it to a mere fact-finding body. This result is in direct contravention of Congress's scheme which divided the lawmaking and policymaking functions between the Secretary and the Commission.

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[2] As the Fourth Circuit has recognized, to give the Congressional scheme any meaning, the decisions of federal safety and health review commissions must carry substantial weight. *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d at 1262. Without such deference the Secretary's interpretations would be the sole source of administrative expertise on legal and policy questions. Had Congress intended the Secretary's views to have exclusive weight on legal and policy issues, however, there would have been no need to create an expert independent commission. It is the Commission, not the Secretary, that Congress intended to provide the final and authoritative interpretation of the Mine Act.

The panel majority's substitution of its own judgment for the expertise of the Commission led the majority into an egregious misstatement of the policies underlying the walkaround pay provision. With virtually no discussion, the panel majority concluded that Congress could not have intended to compensate miners for the regular inspections alone. Appendix at 23a. Regular and spot inspections, however, are entirely different in scope and purpose. Because regular inspections are detailed and extensive, it is conceivable that miners accompanying inspectors on these inspections could improve the inspector's effectiveness by providing another "pair of eyes" and could enhance miner consciousness as to the complex regulatory scheme created by the Mine Act. Spot inspections, by contrast, usually focus on one hazard and usually involve narrow, technical procedures. For example, the spot inspection at issue in the *Helen* case involved only two tests: one for methane concentration and one for air velocity. Another pair of eyes would not have assisted the inspector in conducting these tests, and observing the inspector perform these tests would hardly have enhanced the consciousness of miners who performed or observed similar tests on a regular basis. Thus, as the Commission recognized, sound policy reasons exist for distinguishing between spot and regular inspections consistent with the remedial functions of the Mine Act.

It was therefore improper for the court of appeals majority to disregard the Commission's holding and substitute its own opinion as to the underlying policies of the Mine Act for the Commission's interpretation of Congressional goals. A court is not free to disregard statutory limitations simply because it considers them "unsuited to achieving the general purpose in a particular case." *Commissioner v. Gordon*, 391 U.S. 83, 93 (1968). The panel majority, however, turned a deaf ear to this principle

and, with blind adherence to its tortured analysis, refused to accept the result that logic and candor compelled. The court of appeals exceeded all constraints on the proper functions of the judiciary, and its decision must be reversed.

## CONCLUSION

In holding that the walkaround pay right extends to all inspections, the court of appeals flagrantly disregarded explicit and dispositive legislative history as well as the reasoned decision of the Commission. The panel majority's opinion directly conflicts with the teachings of this Court, with the opinions of the Fourth, Sixth and Eighth Circuits, and with the statutory scheme Congress created under the Mine Act.

A writ of certiorari should be granted and the court of appeals' decision reversed.

Respectfully submitted,

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# APPENDIX A

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 79-2503

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

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No. 79-2518

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

HELEN MINING COMPANY and
KENTLAND-ELKHORN COAL CORPORATION, INTERVENORS

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No. 79-2536

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

KENTLAND-ELKHORN COAL CORPORATION, INTERVENOR

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No. 79-2537

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,
RESPONDENT

HELEN MINING COMPANY, INTERVENOR

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No. 80-1021

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,
RESPONDENT

UNITED MINE WORKERS OF AMERICA and
ALLIED CHEMICAL CORPORATION, INTERVENORS

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Petitions for Review of Orders of the
Federal Mine Safety and Health Review Commission

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Argued January 12, 1981

Decided February 23, 1982

Judgment entered this date

*Cynthia L. Attwood*, Counsel, Department of Labor, with whom *Dennis R. McDaniel*, Attorney, Department of Labor, was on the brief, for petitioner Ray Marshall, Secretary of Labor, Department of Labor, in Nos. 79-2536, 79-2537, and 80-1021.

*Mary Lu Jordan* and *Harrison Combs* were on the brief for petitioner United Mine Workers of America in Nos. 79-2503 and 79-2518 and intervenor United Mine Workers of America in No. 80-1021.

*Todd D. Peterson*, with whom *Richard McMillan, Jr.*, was on the brief, for intervenor Helen Mining Company in Nos. 79-2518 and 79-2537.

*Anthony J. Steinmeyer* and *Marleigh Dover Land*, Attorneys, Department of Justice, were on the statement in lieu of brief for respondent Federal Mine Safety and Health Review Commission.

*George H. Cohen* and *Mary-Win O'Brien* were on the brief for *amicus curiae* United Steelworkers of America, urging that the Commission decisions should be set aside, in Nos. 79-2518, 79-2536, 79-2537, and 80-1021.

*C. Lynch Christian, III*, was on the brief for intervenor Kentland-Elkhorn Coal Corporation in Nos. 79-2518 and 79-2536.

*Lee F. Feinberg* entered an appearance for intervenor Allied Chemical Corporation in No. 80-1021.

Before TAMM and WALD, *Circuit Judges*, and HAROLD H. GREENE,* *United States District Judge* for the District of Columbia.

Opinion for the court filed by *District Judge* GREENE.

Concurring opinion filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Circuit Judge* TAMM.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

GREENE, *District Judge*: The issue in these consolidated cases[1] is whether under section 103(f)[2] of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, miner representatives are entitled to payment of their regular wages for the time they spend

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[1] Before the Court for review are decisions of the Federal Mine Safety and Health Review Commission in Nos. 79-2537 and 79-2518, Secretary of Labor v. Helen Mining Co., Docket No. PITT 79-11-P (Nov. 21, 1979) (Adm. Rec. at 17); Nos. 79-2536 and 79-2503, Kentland-Elkhorn Coal Corp. v. Secretary of Labor, Docket No. PIKE 78-399 (Nov. 30, 1979) (Adm. Rec. at 59); and No. 80-1021, Secretary of Labor v. Allied Chemical Corp., Docket No. WEVA 79-148-D (Dec. 6, 1979) (Adm. Rec. at 80). Petitioners in all the cases are the Secretary of Labor and the United Mine Workers of America. Although the Commission is the respondent, it has not actively participated in the proceedings here, preferring to rely upon its formal decisions. The three mining companies, Helen, Kentland-Elkhorn, and Allied Chemical, have intervened as respondents, and they have filed briefs and have participated in oral argument. The United Steelworkers of America, AFL-CIO, has filed a brief amicus curiae urging that the decisions of the Commission be set aside.

[2] Section 103(f), 30 U.S.C. § 813(f), provides in relevant part that

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspections and to participate in pre- or post-inspection conferences held at the mine. . . . Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. . . . However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.

accompanying federal officers on certain inspections provided for under the Act.

Section 103(a) of the Act requires the Secretary of Labor periodically to conduct certain mine inspections.[3] No one disputes that miner representatives have a right

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[3] Section 103(a), 30 U.S.C. § 813(a), provides that

> Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, *the Secretary [of Labor] shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year.* The Secretary [of Labor] shall develop guidelines for additional inspections of mines based on criteria including, but not limited to the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection under this chapter, the Secretary [of Labor], or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon or through any coal or other mine [emphasis added].

to be present during these mandatory inspections and that they are entitled to be paid for the time they spend attending them. The controversy here revolves around additional, so-called "spot," inspections conducted by the Labor Department, the question being whether the companies have the duty to provide compensation also for miner representatives' walkaround time with respect to these irregular inspections.[4] The Federal Mine Safety and Health Review Commission answered that question in the negative, and the Secretary of Labor and the United Mine Workers of America petitioned this Court for review. For the reasons stated below, we have concluded that the Commission erred, and we reverse.

## I

The facts are not in dispute. In both *Helen Mining Co.* and in *Allied Chemical Corp.*, employees of the Department of Labor conducted spot inspections of certain mines to check for excessive release of methane gas. See note 4, *supra*. A representative of the miners accompanied the inspector in each instance for the entire inspection, but the companies refused to pay these employees their wages for the time spent in these inspections. In *Helen Mining Co.*, the Department of Labor thereupon issued a citation under 104(a) and an order under

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[4] Such inspections are authorized in mines liberating excessive quantities of explosive gas or in which some other especially hazardous condition exists (section 103(i)), and in response to certain requests by miners or miner representatives (section 103(g)(1)). In addition to these inspections explicitly authorized by specific statutory provisions, the Mine Safety and Health Authority (MSHA) of the Department of Labor conducts spot inspections for such purposes as electrical, health, ventilation, roof control, and other examinations. Section 103(f) of the Federal Mine Safety and Health Act Interpretive Bulletin, 43 Fed. Reg. 17546-47 (1978); *see* note 6, *infra*. As indicated below, section 103(a) provides the Department's ultimate authority for these additional inspections.

section 104(b),[5] finding that the Company had violated the Act.[6] The Department also petitioned the Commission for an assessment of a civil penalty under section

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[5] Section 104(a) of the Act, 30 U.S.C. § 814(a), authorizes the Secretary to issue a citation to a mine operator whenever he believes that the operator has violated the Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant thereto. Section 104(b), 30 U.S.C. § 814(b), provides for the issuance of withdrawal orders to the operator if it is found that a violation described in a citation has not been abated.

[6] The Secretary's construction of section 103(f) can be found in the Interpretive Bulletin issued by the Assistant Secretary of Labor for MSHA on April 19, 1978. *See* note 4, *supra*. The bulletin discusses the types of activities which, according to the Department of Labor, give rise to participation rights by the miners in federal mine inspections. It states that section 103 entitles a miner representative to participate in the inspection of any coal or other mine made "pursuant to the provisions of subsection (a) [of section 103]" and asserts that an inspection is made pursuant to subsection (a) if it is conducted for one of the purposes enumerated in that subsection.

According to the bulletin, spot inspections are "clearly conducted 'pursuant to' section 103(a)," since "they are carried out for the purpose of determining if an imminent danger or a violation exists," one of the purposes for inspections enumerated in section 103(a). 43 Fed. Reg. 17547-48. The provision in section 103(a) for mandatory regular inspections of mines is described as the "inclusion of a statutory minimum number of inspections at each mine [which] is no more than an additional requirement [and] does not affect the participation right." 43 Fed. Reg. 17547. The bulletin also lists a variety of activities not giving rise to participation rights under section 103(f). 43 Fed. Reg. 17548.

In defining the scope of the walkaround compensation right, the bulletin finds that under section 103(f) "protection against loss of pay during participation in inspections is as broad as the participation right itself," and it concludes that "[t]he participation right, and the right to suffer no loss of pay, is not limited to the statutory minimum number of inspections required to be carried out annually by the Secretary." 43 Fed. Reg. 17548-49.

110 of the statute.[7] In *Allied Chemical*, the Secretary filed a complaint with the Commission charging discrimination by the mining company under section 105(c)(1) of the Act.[8]

After a hearing, an administrative law judge held in *Helen Mining* that no violation of section 103(f) had occurred, and he denied the petition, but another ALJ concluded in *Allied Chemical* that the Act had been violated and issued a cease and desist order. The Commission affirmed in *Helen Mining Co.* and reversed in *Allied Chemical*, holding that the statute requires compensation to be paid only in connection with the regular inspections.

The *Kentland-Elkhorn* case, the third of these consolidated actions, involved a specialized electrical spot inspection.[9] There, the company refused to pay a miner

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[7] Section 110(a), 30 U.S.C. § 820(a), provides for the assessment of a civil penalty on a mine operator who violates any provision of the Act. Section 110(i), 30 U.S.C. § 820(i), authorizes the Commission to assess penalties proposed to it by the Secretary.

[8] Section 105(c)(1), 30 U.S.C. § 815(c)(1), prohibits discrimination against or interference with the exercise of the statutory rights of any miner. Section 105(c)(2), 30 U.S.C. § 815(c)(2), authorizes the Secretary to file complaints with the Commission for violations of this subsection. For the purposes of the proceeding in this Court, the difference between these procedures and those in Helen Mining are not significant.

[9] The Secretary's Interpretive Bulletin, *see* notes 4 and 6, *supra*, makes reference to the conduct of such specialized electrical inspections for purposes of determining the existence of an imminent danger or a violation of the Act. 43 Fed. Reg. 17547 (1978). The decision of the ALJ in the Kentland-Elkhorn case also refers to an MSHA manual which apparently requires such an inspection to be conducted once annually. Adm. Rec. at 50. The record contains no other information about the MSHA manual or any requirements thereunder.

The particular electrical inspection involved in this case happened to occur at the same time that one of the four

who accompanied the inspector during the two-day inspection for his walkaround time, and a citation and order were issued under section 104 on account of that refusal. The mining company applied to the Commission for review of the Secretary's enforcement action. The ALJ, after hearing, concluded that section 103(f) applied only to regular inspections, and he vacated the citation and order. The Commission affirmed, citing its previous decision in *Helen Mining Co.*

II

The scope of a miner representative's right to participate in mine inspections, and his right to do so without loss of pay, are governed exclusively by subsections (a) and (f) of section 103 of the Act.

Under subsection (a), the Secretary is required to determine, among other things, whether an imminent danger exists within a mine, and whether there is compliance with the mandatory health or safety standards and with any outstanding citations, orders, or decisions.[10] To that end, he must make "frequent inspections" and, more specifically, he is required to "make inspections of each underground coal or other mine in its entirety at

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yearly regular inspections required under section 103(a) was taking place. It was undisputed before the Commission, however, that the electrical inspection was not part of the regular inspection and that the two were entirely separate.

[10] The other purposes enumerated in subsection (a), which involve the gathering of information with regard to health and safety standards and conditions, appear to fall under the auspices of the Secretary of Health, Education, and Welfare [now Secretary of Health and Human Services], not the Secretary of Labor. Since the inspections for which miner participation rights are provided in section 103(f) are those conducted by the "Secretary or his authorized representative," and since "the Secretary" is defined for the purposes of the Act to mean the Secretary of Labor (section 3(a), 30 U.S.C. § 802(a)), the information-gathering purposes within the province of HHS do not concern us here.

least four times a year, and of each surface coal or other mine in its entirety at least two times a year." See note 3, *supra*. Subsection (f), in turn, entitles a miner representative to accompany the federal mine inspector "during the physical inspection of any . . . mine made pursuant to the provisions of subsection (a)," and it further provides that any "representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." See note 2, *supra*.

This statutory language is susceptible of three possible interpretations, and each of these alternatives has been embraced by one or more of the parties to this controversy.

The mine operators contended below that the only inspections made "pursuant to the provisions of subsection (a)" are the regular inspections required by the specific language of the third sentence of subsection (a). If that construction is correct, the participation of miners in inspections, and the right to be compensated therefor, is limited to these mandatory regular inspections. In the view of the operators, when the Secretary conducts other inspections, including the spot or the electrical inspections at issue here, there is no right of either participation or payment.[11]

The approach taken by the Department of Labor, both in its Interpretive Bulletin (see note 6, *supra*) and before this Court, is that any inspection furthering the purposes outlined in subsection (a) is made "pursuant to"

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[11] Before this Court, the mine operators contend that the issue to be decided is the scope of the walkaround pay right, and they urge affirmance of the Commission's ruling that compensation is not required for spot inspections. However, the operators do not appear to have abandoned their view that the participation rights themselves are also limited to regular inspections. In any event, the participation rights question is necessarily before us in view of the positions advanced by the other parties.

the provisions of that subsection, and that the miners are therefore entitled to participate in all such inspections and to do so without loss of pay.

The Commission found the statute not to favor clearly either of these two approaches.[12] To resolve the ambiguity, it searched the legislative history and it there found support for a third alternative: that while the miners have a right to participate in all mine inspections, they are entitled to be paid only for their participation in the regular, mandatory inspections.[13] We will consider first whether the Commission's conclusion can be sustained.

## III

In reaching its decision, the Commission relied exclusively upon a statement by Representative Carl Perkins

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[12] The Commission rejected the Secretary's position because it understood that position to permit walkaround and compensation rights with regard to any inspection, in its view rendering meaningless the phrase "pursuant to the provisions of subsection (a)" contained in section 103(f). It also noted that while certain other categories of inspections were specifically authorized elsewhere (see sections 103(g)(1), and 103(i)), the only type of inspection explicitly described in subsection (a) is the mandatory regular inspection of the entire mine. Secretary of Labor v. Helen Mining Co., Docket No. PITT 79-11-P (Nov. 21, 1979), Adm. Rec. at 23.

As for the operators' approach, the Commission concluded that it conflicts with the obvious congressional purpose. Section 103(h) of the 1969 Mine Act—the predecessor to the present statute—entitled coalminer representatives to accompany inspectors on *any* inspection (although without compensation). Under the construction offered by the mine operators, miners would have fewer walkaround rights under the 1977 Act than the coalminers had under the 1969 Act—a result which the Commission regarded as contrary to the will of Congress. *Id.* at 24.

[13] Two of the five commissioners dissented, supporting essentially the view espoused by the Department of Labor. Adm. Rec. at 28, 40.

—a principal sponsor of the 1977 Mine Act, the chairman of the House Committee on Education and Labor during its consideration, and chief conferee for the House when the statute was in conference committee. Congressman Perkins stated on the floor of the House following the adoption by the House-Senate conferees that

> [I]t is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator.[14]

The Commission found

> [t]he thrust of Mr. Perkins' statement [to be] that it was the intention of the Senate and House conferees to preserve the right under the 1969 Act to accompany inspector on all inspections, but to accord a walkaround pay right only for regular inspections.[15]

In the opinion of the Commission, Congressman Perkins' statement is the "best guide" to the legislative intent on this matter, and as such it is to be given decisive weight.[16]

Although it is certainly true that resort to legislative history is appropriate when the words of a statute are

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[14] 123 Cong. Rec. 35410 (1977) (remarks of Rep. Perkins), *reprinted in* Subcomm. of Labor of the Senate Comm. on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* (Comm. Print, 1978) 1358 [hereinafter cited as *Leg. Hist.*].

[15] Secretary of Labor v. The Helen Mining Co., Docket No. PITT 79-11-P (Nov. 21, 1979), Adm. Rec. at 26.

[16] *Id.*, at 26-27.

ambiguous,[17] it is equally well-settled that, before resorting to legislative history, a court or administrative body should first look to the language of the law itself to determine its meaning.[18] Committee reports, the statements of committee members, or other legislative materials may generally be considered only in case of ambiguity; they may not be used as a means for construing a statute contrary to its plain terms.[19] Upon examination, it is readily apparent that the Commission's reliance upon the statement of Congressman Perkins has produced a result which is in conflict with an unambiguous requirement of section 103(f), and that it therefore cannot stand.

The phrase "pursuant to the provisions of subsection (a)" in subsection (f) of section 103 may well be ambiguous on the question as to which categories of inspections give rise to participation rights on the part of miners. See Part IV, *infra*. That subsection does state quite unambiguously, however, that whenever a miner *is* entitled to participate in an inspection "pursuant to" subsection (a), he "shall suffer no loss of pay during the period of his participating in the inspection made under this subsection." In other words, under the language of the statute itself the right to walkaround pay is clearly coextensive with the right to accompany the

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[17] United States v. Public Utilities Commission of California, 345 U.S. 295, 315 (1952); Aviation Consumer Action Project v. Washburn, 175 U.S. App. D.C. 273, 278, 535 F.2d 101, 106 (1976).

[18] *See, e.g.*, Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979).

[19] *See, e.g.*, Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U.S. 184, 199 (1913); FTC v. Manager, Retail Credit Co., 169 U.S. App. D.C. 271, 278, 515 F.2d 988, 995 (1975); Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297, 308 (D.D.C. 1976); 2A *Sutherland Statutory Construction*, § 48.14, p. 220 (4th ed. 1973).

inspector under subsection (f),[20] and there is simply no basis for reading it as supporting the bifurcation of participation and compensation rights espoused in the Commission's decisions.[21]

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[20] Of course, this walkaround pay right is subject to the limitation contained in subsection (f) that only one miner representative may accompany an inspector without loss of pay. *See* Magma Copper Co. v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981). This limitation has nothing to do with the *type* of inspection to be conducted, however; it concerns only the number of miners entitled to walkaround pay on any given inspection.

[21] The dissent takes us to task for concentrating "on a single sentence" in the Act, and it suggests that the focus should instead be on the statutory structure, history, object, and policy (dissenting opinion, pp. 5, 18-19). But what is at issue is not a mere sentence but the question whether, *on the co-extensiveness question*, the statutory language is ambiguous. Subsection (f) provides that

> [miner representatives may accompany federal inspectors] during the physical inspection of any . . . mine made pursuant to the provisions of subsection (a) . . . . Such representative of miners . . . shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.

The dissent freely acknowledges that miner representatives have the right to accompany inspectors in all inspections, including those of the spot or special variety (dissenting opinion, pp. 4-5). If that be true—and, like Judge Tamm, we have concluded that it is—it is dispositive of the basic statutory question, for not only is there nothing in subsection (f) to support a distinction between the right to compensation and the walkaround right, but the former is defined by precisely the same reference as the latter. We do not believe it to be an undue fixation on language to follow so plain a mandate and to conclude that whenever miner representatives have the right to accompany they also have the right to be paid.

Moreover, save only for the statement of Representative Perkins, every single reason provided in the dissent for holding that there is no right to compensation with respect to certain inspections would also deny walkaround rights in

The Commission therefore erred in even considering the statement of Congressman Perkins. In any event, that statement was not entitled to the overwhelming weight attributed to it by the Commission, for it could hardly be said to reflect the unambiguous intent of the Congress. Congressman Perkins delivered his statement three weeks after the Senate had completed its consideration of the conference report and had voted passage of the bill,[22] that is, at a time when that body had little or no realistic opportunity to voice its concurrence with or opposition to the gist of his remarks.[23] Thus, whatever weight may properly be attributed to Congressman Perkins' remarks as reflecting the will of the House of

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those same inspections. Judge Tamm relies to a considerable extent on the "pursuant to" phrase in subsection (f) for his conclusion that miner representatives are not entitled to be paid for participation in spot inspections. But that phrase does not only modify the compensation provisions of the statute; it applies equally to the provisions that deal with walkaround rights. Thus, if the phrase had the broad consequences the dissent ascribes to it, the miner representatives would have neither compensation rights nor walkaround rights in spot inspections—a result everyone agrees to be contrary both to the language of the Act and its legislative history.

As for the broader policies of the statute, they may best be described as the protection of the health and safety of the miners. *See* pp. 24-26 *infra*. These purposes are far more likely to be advanced by a construction which provides walkaround pay in connection with inspections conducted to discover and remedy specific safety hazards than by one which would discourage remedial measures by denying to the miner representatives their regular salaries while attending the necessary inspections.

[22] The Senate agreed to the conference report on October 6, 1977; Congressman Perkins delivered his speech, and the House agreed to the conference report, on October 27, 1977.

[23] Commissioner Jestrab, dissenting in *Helen Mining*, noted that there was "no evidence that Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate." Adm. Rec. at 34.

Representatives, it did not and could not in any sense be regarded as reflecting that of the Senate.

It is also of significance in this regard that the conference report itself does not, explicitly or by inference, mention the agreement attested to by Congressman Perkins but conveys the quite contrary impression that the broad walkaround pay rights granted by the Senate bill remained unaffected by the changes made by the conference.[24]

In these circumstances, the effect of the Commission's construction would be essentially to permit a single member of one House[25] to alter the meaning of the bill, and effectively to deprive the House that acted first of any real voice in the final meaning of the enactment. That is plainly improper. See *Department of Air Force* v. *Rose*, 425 U.S. 352, 365-66 (1976); *Jordan* v. *Department of Justice*, 192 U.S. App. D.C. 144, 158-61, 591 F.2d 753, 767-71 (1978); *Vaughn* v. *Rosen*, 173 U.S. App. D.C. 187, 193-94, 523 F.2d 1136, 1142-43 (1975); *American Smelting and Refining Co.* v. *Occupational*

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[24] The report indicates that on the issue of miner representative participation the conference bill "conforms to the Senate bill." H.R. Rep. 655 (Conf. Rep.), 95th Cong., 1st Sess. 45 (1977), *reprinted in Leg. Hist.* at 1323. The Commission itself acknowledged that at the House-Senate conference the "House conferees largely receded and agreed to the Senate bill over the House bill." Secretary of Labor v. Helen Mining Co., Docket No. PITT 79-11-P (Nov. 21, 1979), Adm. Rec. at 27. *See also*, note 30, *infra*.

[25] To be sure, Congressman Perkins chaired the conference and it has sometimes been said that statements made by one in that capacity may be "regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports" (2A *Sutherland Statutory Construction*, § 48.14, p. 220 (4th ed. 1973)). But that general proposition is of limited significance where, as here, the substance of the remarks in question was contrary to the statutory provisions and was, at best, implicitly adopted by only one House of Congress.

*Safety and Health Review Commission*, 501 F.2d 504, 509-11 (8th Cir. 1974); *Getman* v. *N.L.R.B.*, 146 U.S. App. D.C. 209, 212 n. 8, 450 F.2d 670, 673 n. 8 (1971); K. Davis, Administrative Law Treatise, § 3A.31, p. 176 (1980 Supp.).

As we said in a similar context in *National Small Shipments Traffic Conference, Inc.* v. *CAB*, 199 U.S. App. D.C. 335, 344, 618 F.2d 819, 828 (1980):

> Courts in the past have been able to rely on legislative history for important insights into congressional intent. Without implying that this is no longer the case, we note that interest groups who fail to persuade a majority of the Congress to accept particular statutory language often are able to have inserted in the legislative history of the statute statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative intent.

For the reasons stated, Congressman Perkins' statement was not entitled to decisive weight in the construction of section 103(f), and the Commission's decisions, which wholly depend upon that statement, cannot be upheld.[26]

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[26] Petitioner Secretary of Labor has raised the issue of whether, as a general procedural matter, his interpretation of the Act or that of the Commission is entitled to greater deference on reveiw. The Commission and the Secretary are divided on this issue, although the former does recognize that the standards and regulations promulgated by the Secretary are entitled to "special weight." Secretary of Labor v. Helen Mining Co., Docket No. PITT 79-11-P (Nov. 21, 1979), Adm. Rec. at 22. The Court need not decide what weight should generally be afforded to a decision by the Commission relative to that given to a conflicting interpretation by the Secretary, since in this instance the Commission's construction is plainly incorrect and unsupportable by the terms of the

## IV

Having rejected the Commission's construction of subsection (f), we are left to decide between the remaining two alternatives: (1) that statutory walkaround rights are restricted to regular inspections because they are the only inspections conducted "pursuant to the provisions of subsection (a)," or (2) that walkaround rights arise for any of the physical mine inspections performed for the purposes referred to in that subsection.

Although on this issue the statute is not wholly unambiguous, its language more strongly than not favors the latter interpretation. Certainly, the only type of inspection specifically required by subsection (a) is the mandatory regular inspection, and that fact supports an argument that the phrase "pursuant to the provisions of subsection (a)" covers these regular inspections and nothing more. We are not persuaded, however, that this construction most faithfully implements either the language enacted by the Congress or the legislative purpose.

The fact is that regular inspections are not the only ones mentioned in the subsection; that provision also directs the Secretary to conduct "frequent [other] inspections" for the purpose of determining "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards." Thus, on the basis of the statutory language alone, it would appear that subsection (f) attaches walkaround rights to all the inspections at issue here.

This conclusion is fortified by the circumstance that several types of inspections are plainly conducted "pursuant to" that subsection (even if they are not specifically required thereby) since they are not authorized

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Act and therefore entitled to no deference. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). As to the weight to be afforded to the Secretary's interpretation of the Act, *see* p. 24, *infra*.

by any other provision in the statute. For example, with respect to certain spot inspections—such as the electrical inspection performed in the *Kentland-Elkhorn* case—there is no statutory authorization other than that contained in the general provisions of subsection (a). Thus, if these inspections are valid at all—a conclusion apparently not contested by anyone, including the mine operators—they must have been undertaken "pursuant to the provisions of subsection (a)." More explicit statutory support does exist for some of the other spot inspections (*e.g.*, section 103(i) (gas or other hazardous conditions) or 103(g)(1) (requests of miners)), but here, too, the basic authority[27] for the inspection rests in subsection (a).[28]

The legislative history and other extrinsic aids to statutory construction likewise support the interpretation that all safety inspections are conducted pursuant to subsection (a).

The principal discussion of the two subsections at issue here is found in the report of the Senate Committee

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[27] As Commissioner Lawson aptly observed (Adm. Rec. at 41), although a spot gas inspection may be required to be conducted with a certain frequency by subsection (i), it is nevertheless conducted "pursuant to the provisions of subsection (a)" because its purpose is to determine whether an imminent danger exists and whether there is compliance with mandatory health and safety standards.

[28] It is noteworthy, too, that the right of the Department of Labor to enter a mine without a warrant flows solely from subsection (a), and that this subsection is also the only provision prohibiting the Department from giving the operator advance warning of impending inspections. If only regular inspections were covered by subsection (a), both the entry provision and the warning prohibition would apply only to regular inspections—an absurd result. Compare section 110(e), 30 U.S.C. § 820(e), which imposes criminal penalties on any person giving advance notice of *any* inspection.

on Human Resources dated May 16, 1977 on S. 717,[29] which states that

> [f]requent inspections and investigations are authorized under Section 104 for a variety of purposes, such as determining whether or not there is compliance with mandatory health and safety standards or with any requirement of the Act. . . .
>
> Section 104(a) would require that the Secretary of Labor conduct at least four inspections a year of each underground mine in its entirety and two inspections a year of each surface mine in its entirety . . . . While this provision sets a minimum number of inspections, the Committee notes that the bill also requires the Secretary to increase the number of inspections required based on guidelines which he develops.[30]

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[29] S. Rep. No. 181, 95th Cong., 1st Sess. (1977), *reprinted in Leg. Hist.* at 589. Section 104(e) of S. 717 contained the same basic text, with insignificant revisions, of what was to become section 103(f) in the final bill. The House bill, H.R. 4287, contained no comparable walkaround pay provision. *See* H.R. Rep. No. 655 (Conf. Rep.), 95th Cong., 1st Sess. 45, *reprinted in Leg. Hist.* at 1323.

[30] *Leg. Hist.* at 614. The statutory language which the report here describes was taken almost verbatim from section 104(a) of S. 717 and placed in section 103(a) of the Act, which now reads as follows:

> The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws.

Both section 104(a) of S. 717 and section 103(a) of the Act require the making of mandatory regular inspections and the development of guidelines for additional inspections. Thus, when the Committee stated in its report that "the bill also requires the Secretary to increase the number of inspections," it was referring to the provisions of subsection (a).

This language portrays the yearly regular inspections as the "minimum" number of inspections to be carried out under subsection (a), and it requires the development of guidelines for additional inspections beyond the strict minimum, strongly suggesting that the Senate committee viewed subsection (a) as authority for inspections beyond the regular inspections of the entire mine.[21]

The Senate report further discusses miners' walk-around rights under the bill as follows:

> Section 104(e) [22] contains a provision based on that in the Coal Act,[23] requiring that representatives of the operator and miners be permitted to accompany inspectors in order to asist [sic] in conducting a full inspection . . . . It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would

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[21] The House bill, H.R. 4287, did not contain the additional inspections requirement, and the House Committee on Education and Labor did not discuss the inspection provisions of the bill in any great detail. *See* H.R. Rep. No. 312, 95th Cong., 1st Sess. (1977), *Leg. Hist.* at 357.

[22] Section 103(f) of the statute as enacted.

[23] Section 103(h) of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 *et seq.*, provided that

> At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection. 83 Stat. 749.

> unfairly penalize the miner for assisting the inspector in performing his duties.[34]

There is no reference to the exclusion of some kinds of inspections from the miner participation rights; on the contrary, the report states that the subsection is based on a similar provision in the Coal Act, which allowed for miner accompaniment of inspectors on all inspections. See note 34, *supra*. It is also apparent from this language that miner participation in inspections, and full compensation therefor, were considered by the committee to constitute important tools in the effort to increase miners' awareness of the hazards they face and the measures they can take to achieve a safe and healthy working environment.

The importance of this factor was underscored by a colloquy between Senators Helms and Javits on the Senate floor, "the only extended discussion of walkaround pay" contained in the legislative history. *Magma Copper Co.* v. *Secretary of Labor*, *supra*, 645 F.2d at 697. Senator Helms introduced an amendment to S. 717 that would have stricken any reference to walkaround pay. Senator Javits successfully opposed the amendment, giving the following reasons:

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.
>
> In addition, there is the general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspectors is an element of the expense of providing a safe and healthful workplace . . . .

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[34] S. Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), *reprinted in Leg. Hist.* at 616-17.

> One of the things we found at the hearing, Mr. President, that all the witnesses agreed to, is that miners' safety consciousness need [sic] to be materially improved . . . .
>
> But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.
>
> In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper.[35]

There is, we think, no reasonable basis for concluding that Congress intended to grant broad walkaround rights to miner representatives for routine inspections but to deny such rights with respect to inspections conducted to deal with specific safety hazards.[36] So paradoxical a purpose should not be imputed to the Congress without very strong evidence that this was its intent. As indicated, not only is there no such evidence, all indications are to the contrary.[37]

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[35] 123 Cong. Rec. 20019-20 (1977), *reprinted in Leg. Hist.* at 1054.

[36] Indeed, under the Commission's interpretation, a miner who requests a special inspection under 103(g)(1) (*see* note 4, *supra*) would not be paid for participating in the inspection in order personally to show the condition to the inspector or to explain why it is dangerous.

[37] A principal impetus for enactment of the current statute was the then recent Scotia mine disaster in which a number of miners and several federal inspectors were killed as a result of two explosions of accumulated methane gas. *See Leg. Hist.*, *e.g.*, at 87, 592-93, 596. Yet the Commission's decision

We must also bear in mind that "safety legislation is to be liberally construed to effectuate the congressional purpose," [38] and that the construction of these provisions contained in the Interpretive Bulletin of the Secretary of Labor [39] "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." [40] The Court of Appeals for the Ninth Circuit—

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in the *Helen Mining Co.* and *Allied Chemical Corp.* cases would have the effect of denying compensation to miners' representatives for time spent in spot methane inspections.

[38] Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980); United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969); Lilly v. Grand Trunk Western Railroad Co., 317 U.S. 481, 486 (1943); Magma Copper Co. v. Secretary of Labor, *supra*, 645 F.2d at 696-97; District 6, United Mineworkers of America v. United States Department of Interior Board of Mine Operations Appeals, 183 U.S. App. D.C. 312, 317, 562 F.2d 1260, 1265 (1977).

[39] 43 Fed. Reg. 17546 (1978). *See* note 6, *supra*, for a summary of the Bulletin's contents.

[40] Magma Copper Co. v. Secretary of Labor, *supra*, 645 F.2d at 696, *quoting* Whirlpool Corp. v. Marshall, *supra*, 445 U.S. at 11. *See also* the Senate committee report on S. 717, which states that

> [s]ince the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts.

S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in Leg. Hist.* at 637.

Intervenor Kentland-Elkhorn Company contends that the Interpretive Bulletin is invalid due to the Secretary's failure to comply with the rulemaking procedures mandated by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* It is clear, however, that under Chamber of Commerce v. OSHA, 204 U.S. App. D.C. 192, 196-97, 636 F.2d 464, 468-69 (1980), this bulletin constitutes an interpretive, not a legislative rule, since it seeks to explain and construe the walkaround pay rights contained in section 103(f) rather than to supplement

the only other Circuit to have interpreted section 103(f)[41] —has aptly noted that "[t]he walkaround pay provision and the participation right are both aimed at the protection of the health and safety of miners—the single overriding purpose of the legislation." *Magma Copper Co.* v. *Secretary of Labor*, *supra*, 645 F.2d at 698.

Given the broad health and safety purpose underlying the Act in general[42] and the miners' walkaround rights in particular, as well as the absence of significant support either in the statutory language[43] or the legislative

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the Act by imposing new obligations or granting new rights. It is, accordingly, exempted from APA rulemaking procedures. *See* 5 U.S.C. § 553(b)(3)(A).

[41] The issue before the Ninth Circuit was not whether miners would be compensated for non-regular inspections, but rather whether, on an inspection for which there were several inspectors, one miner per inspector was required to be paid for his walkaround time. In line with the safety purposes of the Act, the court held that one miner per inspector was entitled to compensation. Magma Copper Co. v. Secretary of Labor, *supra*, 645 F.2d at 698-99.

[42] The current statute was the product of serious legislative concern about health and safety hazards in the nation's mines and their alarming death and injury toll. *See*, *e.g.*, H.R. Rep. No. 312, 95th Cong., 1st Sess. 3 (1977), *reprinted in Leg. Hist.* at 359; 123 Cong. Rec. 23161 (1977) (remarks of Rep. Gaydos), *reprinted in Leg. Hist.* at 1172.

[43] It is true that our choice of the Secretary's interpretation of section 103(f) over those of the mine operators and of the Commission is not entirely unflawed. The issue would be beyond debate if several types of inspections had not been described in provisions other than section 103(a) and if that subsection had not included both specific and general inspection authority. *See* note 12, *supra*; Secretary of Labor v. Helen Mining Co., Docket No. PITT 79-11-P (Nov. 21, 1979), Adm. Rec. at 23. But we are, of course, required to interpret the statute as Congress wrote it, not as we wished it might have been written so as to remove all possible ambiguities. Among the three possible interpretations only that of the Secretary both avoids outright conflict with the plain terms of the statute and conforms to the health and safety purpose underlying the Act, and it is therefore the one to be preferred.

history for an interpretation narrowing those rights to the minimum number of inspections required by section 103(a), we are constrained to reject the construction of the Act that could limit miners' entitlement to walkaround pay to these regular inspections. We agree with the Secretary that under section 103(f) miner representatives are entitled to walkaround pay rights with respect to any physical inspection of a mine carried out under Department of Labor auspices for the purpose of determining "whether an imminent danger exists," or "whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter." [44]

## V

It is clear from the record before us that the electrical inspection and the inspections of excessive liberation of methane gas in question in these cases were performed not for information-gathering, research, or educational purposes,[45] but for determining the existence of imminent dangers and for monitoring compliance with the mandatory safety and health standards under the Act. Accordingly, the miner representatives who accompanied the inspectors are entitled to be paid for the time spent participating in the inspections.

The decisions of the Commission are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

*So ordered.*

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[44] Activities conducted for other purposes that might be labeled "inspections"—for example, the information-gathering investigations to be conducted under HHS auspices (*see* note 10, *supra*)—do not give rise to walkaround rights. *See* the Secretary's Interpretive Bulletin, *supra*, 43 Fed. Reg. at 17548, for a listing of the types of activities which do not give rise to such rights.

[45] *See* note 44, *supra*.

WALD, *Circuit Judge, concurring*: Judge Tamm's dissent suggests a conflict between the panel opinion's treatment of Representative Perkins' remarks and my treatment of remarks by a conference committee member in an altogether different case. *See* slip op. at 14-15 n.41 (Tamm, J., dissenting) (*comparing* slip op. at 12-17 *with Demby* v. *Schweiker*, No. 81-1862 (D.C. Cir. Dec. 15, 1981), slip op. at 7-8 & n.11 (Wald, J., dissenting)). I do not perceive any such conflict. In *Demby*, the majority relied on an ambiguous table in a conference report to negate the clearly expressed intent of *both* the House and Senate. Dissenting from that opinion, I wrote that the conference committee report was completely consistent with the committee reports issued by the two Houses, and that we should not lightly presume that the conference committee stepped outside its mandate to resolve differences. I then noted that this reading of the conference committee's actions was confirmed by the remarks of Senator Schmitt, a conference committee member.

In contrast, the panel's interpretation of subsection 103(f) in this case is supported by the plain language of the statute as well as by relevant committee reports. *See* slip op. at 18-26. Therefore, I see no reason to give Representative Perkins' remarks incorporating a different interpretation "decisive" weight. I concur in the panel's opinion.

TAMM, *Circuit Judge, dissenting*: I must respectfully dissent. Although I recognize the attractiveness of the majority's result, I believe it impermissibly crosses the line that divides construction of a statute to effectuate the will of Congress from construction intended to achieve the preferable policy conclusion. Indeed, there are aspects of the majority opinion one might be inclined to take *cum grano salis* in light of the language Judge Greene employs. While rejecting the result reached by three of five Commissioners of the Federal Mine Safety and Health Review Commission (Commission) and two of the three administrative law judges who ruled on the issue, the majority offers in acknowledgment of possible contrary interpretations of the provisions in question only the grudging concession that the statute "is not wholly unambiguous . . . ."[1] I believe that the Commission's construction of the relevant sections of the Federal Mine Safety and Health Act of 1977 (FMSA)[2] is the one most consonant with the intent of Congress, and I would accordingly affirm the Commission's rulings in these cases.

I.

As the majority correctly notes, the central question we face today is whether under the FMSA miner representatives who accompany federal officials on inspection tours are entitled to the payment of their regular wages for the time spent away from their normal work. The resolution of this question turns on the construction of two subsections of the FMSA that, *inter alia*, authorize the Secretary of Labor to conduct certain mine inspections and require mine operators to compensate with their regular wages the miner representatives who accompany the Secretary's inspectors.

The provision of the FMSA that sets forth the obligation of operators to permit miner representatives to ac-

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[1] Majority opinion (maj. op.) at 18.

[2] 30 U.S.C. §§ 801-962 (1976 and Supp. II 1978).

company inspectors and to provide "walkaround pay" is subsection 103(f).[3] In pertinent part, the subsection states:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine *made pursuant to the provisions of subsection (a) of* [*section 103*] . . . . Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.

30 U.S.C. § 813(f) (Supp. II 1978) (emphasis added). Subsection 103(a)[4] in turn requires the Secretary of Labor to conduct inspections for certain stated purposes. It provides, again in pertinent part:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. . . . *In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground . . . mine in its entirety at least*

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[3] 30 U.S.C. § 813(f) (Supp. II 1978).

[4] 30 U.S.C. § 813(a) (Supp. II 1978).

*four times a year, and of each surface . . . mine in its entirety at least two times a year.*

30 U.S.C. § 813(a) (Supp. II 1978) (emphasis added).

In a thoughtful, detailed opinion, the Commission held that the interplay of these two subsections requires that mine operators provide walkaround pay only for the "regular"[5] mine inspections mandated by subsection 103 (a). *Secretary of Labor v. Helen Mining Co.*, Docket No. PITT 79-11-P (Nov. 21, 1979), Appendix (App.) at 17. Although miner representatives are entitled, according to the Commission, to accompany federal investigators during most "spot"[6] inspections, the mine operators are not obligated to supply walkaround pay to the miner representatives for those inspections. Rejecting the more extreme viewpoints of the mine operators on one hand and the Secretary of Labor on the other,[7] the

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[5] "Regular" inspections are inspections of the entirety of a mine specifically mandated by § 103(a) of the Federal Mine Safety and Health Act of 1977 (FMSA), 30 U.S.C. § 813(a) (Supp. II 1978). Regular inspections are to be distinguished from "spot" inspections that are conducted for certain special purposes and are generically separate from regular ones. These additional inspections may be authorized by specific statutory provisions. *See, e.g.*, 30 U.S.C. § 813(i) (Supp. II 1978) (spot inspection required every five days in mines that liberate excessive amounts of methane gas).

The distinction between "regular" and "spot" inspections is not explicitly set forth in the FMSA. The distinction is, however, generally recognized by federal administrators, mine operators, and miner groups.

[6] *See* note 5, *supra.*

[7] The Secretary of Labor argued before the Federal Mine Safety and Health Review Commission and contends before this court that *any* inspection promoting the purposes noted in the first sentence of § 103(a) is one made "pursuant to" that subsection, and hence, that all or most spot inspections give rise to a compensation right in accompanying miner representatives. *See, e.g.*, Secretary of Labor v. Helen Mining Co., Docket No. PITT 79-11-P (Nov. 21, 1979) at 3; Appendix

Commission found support for its construction of the FMSA in the language of the statute and in the remarks of Representative Carl Perkins, the chairman of the House committee that drafted the House bill and the chief House conferee on the FMSA.[8]

II.

Although somewhat more complex rhetoric is employed, the majority's rejection of the Commission's analysis in *Helen Mining Co.* is predicated fundamentally on a neat syllogism:

> (1) As the right to walkaround pay under the FMSA is "clearly coextensive" with the right to accompany federal inspectors on investigative tours;[9] and
>
> (2) As the Congress could not possibly have intended to cut back on the pre-existing right of miner representatives to accompany federal inspectors during *all* mine inspections;[10]
>
> *Q.E.D.*—Miner representatives are entitled to walkaround pay for all such inspections, and not only for the regular ones mandated by subsection 103(a).

Although the matter is not, strictly speaking, before the court, I tend to agree with the majority's "principle 2": in light of the broad safety goals of the FMSA, it is unlikely that the draftsmen intended to circumscribe

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(App.) at 19. The mine operators contended that *neither* a compensation *nor* a walkaround right existed for inspections other than regular ones, for only regular inspections were conducted "pursuant to" § 103(a). *See, e.g., id.* at 8; App. at 24. The operators do not vigorously press before us, however, this limitation on walkaround rights. *See, e.g.*, Brief for Intervenor-Respondent Helen Mining Company at 20 n.11.

[8] *Helen Mining Co.* at 8-11; App. at 24-27.

[9] *See* maj. op. at 13.

[10] *See id.* at 23.

miner rights that antedated the Act. As the majority notes, miner representatives were entitled to accompany federal inspectors during *all* inspections under the mining legislation that preceded the FMSA.[11] Subsection 103 (h)[12] of the Federal Coal Mine Health and Safety Act of 1969 provided that an authorized miner representative was permitted to accompany federal investigators during all mine inspections, and the Report that accompanied the Senate version of the current FMSA specifically acknowledged the connection between the 1969 provision and the new one.[13] There is no suggestion either in the FMSA itself or in the legislative history that the draftsmen intended to limit walkaround rights, and I agree with the majority and the Commission that the 1977 statute did not achieve this result.

I part ways with the majority, however, when we turn to "principle 1." I do not believe that the FMSA inextricably links miner compensation rights with walkaround rights, and I respectfully submit that the reasoning the majority employs to deduce that link is simplistic. The majority opinion contends that there can be no "bifurcation of participation and compensation rights";[14] the two must stand or fall together. I believe, however, that the majority's conclusion in this regard is the product of a myopic concentration on a single sentence in the FMSA and a concomitant failure to take adequate account of the structure and history of the Act.

My major criticism of the majority opinion centers on what I believe is its objectionable methodology. The majority recognizes that there are three ways to read

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[11] *Id.* at 21-22.

[12] 30 U.S.C. § 813(h) (1976) (repealed).

[13] S. REP. No. 181, 95th Cong., 1st Sess. 28-29 (1977). *See* maj. op. at 21-22 nn.33-34.

[14] Maj. op. at 14.

the relevant language in subsection 103(f).[15] The opinion then dismisses the Commission's interpretation of that subsection by focusing narrowly on the sentence that establishes compensation rights, and by glossing over the ambiguities that pervade the subsection *as a whole*. This is a deft strategy, for it permits the court to eliminate the plausible middle ground position of the Commission; instead, the court is left with two alternatives, one of which may easily be eliminated in light of its clear inconsonance with the aims of the FMSA and with the statutory predecessors of that Act.[16]

Let us, however, turn this methodology around and begin the analysis by determining the compensation rights of the miner representatives, for it is those rights that are properly at the center of this litigation.[17] The relevant language in subsection 103(f) provides that such a representative "shall suffer no loss of pay during the period of his participation in [inspections] made under this subsection." 30 U.S.C. § 813(f) (Supp. II 1978). The inspections made under "this subsection" are, in turn, the "physical inspection[s] of any coal or other mine made pursuant to the provisions of subsection (a) of [section 103] . . . ." *Id.* Thus, the question we must resolve is *which* inspections are made "pursuant to the provisions of subsection (a) . . . ."

This issue is not a simple one to resolve, though in my opinion the better view is the one adopted by the

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[15] *Id.* at 10.

[16] As I suggested above, *see* pp. 4-5, it is clear both from the structure of the FMSA and its legislative history that Congress did not intend to eliminate the all-inclusive walkaround right that antedated the FMSA. I do not believe, however, in contrast to the majority, that the question of the proper scope of walkaround rights is properly before this court. The issue in this case is only the scope of the walkaround pay provision.

[17] *See* note 16, *supra*.

Commission in *Helen Mining Co.* Although there is language in subsection 103(a) that speaks of "frequent inspections" for certain general purposes, the only type of inspection specifically mandated by that provision is the regular inspection of the entire mine. It is beyond cavil that only two of the four sets of purposes[18] for which mine inspections are to be conducted fall under the aegis of the Secretary of Labor, and as to those purposes, subsection (a) states that "the Secretary shall make inspections of each underground . . . mine in its entirety at least four times a year . . . ."[19] Accordingly, the logic of the language of subsection 103(a) itself would lead me to conclude, as it did the Commission, that the only inspections made "pursuant to" that subsection are the regular ones.

This conclusion is fortified when we step back and examine in detail the structure and history of the FMSA. Put most simply, the majority's construction of the "pursuant to" language renders that whole phrase substantively meaningless in the context of subsection (f). If Congress had intended that subsection 103(a) was to constitute the general authorization for all inspections—and, hence, that the "pursuant to" language brought within its ambit all inspections—then it strikes me as peculiar that the simple and inclusive language "any inspection" was not used in subsection 103(f). As the

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[18] As the majority notes, two of the four sets of purposes enumerated in § 103(a) fall under the investigatory domain of the Secretary of Health and Human Services. Maj. op. at 9 n.10. Specifically, the information-gathering purposes set forth under numbers (1) and (2) of § 103(a) are within the aegis of the Health and Human Services Secretary. By contrast, the Secretary of Labor is directed by § 103(a) to conduct inspections to determine "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards" or with other administrative orders promulgated under relevant legislation. 30 U.S.C. § 813(a) (Supp. II 1978).

[19] *Id.*

Commission noted,[20] the argument adopted by today's majority fails to explain why Congress *altered* the general "any inspection" language used in the walkaround provision of the 1969 mine safety statute.[21] The draftsmen of the FMSA were clearly aware of the phrase; indeed, they employed it no fewer than six times in related provisions of the Act to denote general powers or authorizations of general applicability.[22] Clearly, the "pursuant to" language was intended to have a *limiting effect* that the majority simply reads out of the statute.

The weaknesses in the majority's construction of the FMSA are further evident upon examination of the various types of inspections provided for in provisions *other* than subsection 103(a). "Special" or "spot" inspections are mandated by several other sections of the FMSA;[23] the inspection in *Helen Mining Co.* was such

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[20] *Helen Mining Co.* at 7; App. at 23.

[21] The walkaround right under the 1969 mine legislation was contained in § 103(h). That subsection provided:

> At the commencement of *any inspection* of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

30 U.S.C. § 813(h) (1976) (repealed) (emphasis added).

[22] *See* § 103(a), 30 U.S.C. § 813(a); § 103(g)(2), 30 U.S.C. § 813(g)(2); § 104(d)(1), 30 U.S.C. § 814(d)(1); § 104(e)(1), 30 U.S.C. § 814(e)(1); § 104(g)(1), 30 U.S.C. § 814(g)(1); § 107(a), 30 U.S.C. § 817(a).

[23] Subsection 103(g)(1) of the FMSA requires the Secretary of Labor to conduct an inspection if a miner or miner representative has reasonable grounds to believe that a violation of the FMSA or an imminent danger to health or safety exists and so notifies the Secretary. 30 U.S.C. § 813(g)(1) (Supp. II 1978). A spot inspection at stated intervals is required by § 103(i) of mines that liberate excessive quantities of explosive gases or at which other especially hazardous conditions exist. 30 U.S.C. § 813(i) (Supp. II 1978). Sub-

a "spot" inspection.[24] It is true, as the majority notes, that there are inspections conducted by the Secretary of Labor that are neither regular nor specifically authorized by another provision.[25] Yet to me, this fact does not lead to the conclusions drawn by the majority that the "basic authority" for virtually *all* inspections is subsection 103(a) and that all inspections are thereby conducted "pursuant to" that provision.[26] Rather, I find persuasive the Commission's observation that, even if all inspections could be conducted for one of the purposes in subsection (a), the "pursuant to" language "was intended to accord the right to walkaround pay to the only inspection specifically and exclusively described in section 103(a)—the regular inspection."[27]

To be sure, no law professor will ever use the FMSA as a model of draftsmanship; the confusing interrelationship of general and specific authorizations of inspections renders the determination of the scope of the walkaround pay right a most difficult one. Hence, resort to relevant legislative history is perforce appropriate. The majority

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section 202(g) authorizes the Secretary of Health and Human Services to conduct spot inspections to ensure compliance with the health standards in Title II of the FMSA. 30 U.S.C. § 842(g) (Supp. II 1978). Finally, § 303(x) requires the Secretary of Labor to inspect an inactive or abandoned mine prior to the recommencement of mining operations. 30 U.S.C. § 863(x) (Supp. II 1978).

[24] The inspection at issue in *Helen Mining Co.* was a spot check pursuant to subsection 103(i) of the FMSA of a mine that had been found to liberate an excessive quantity of methane. *Helen Mining Co.* at 1; App. at 17.

[25] As the majority notes, maj. op. at 18-19, certain nonregular inspections, such as the electrical inspection at issue in Kentland-Elkhorn Coal Corp. v. Secretary of Labor, Docket No. PIKE 78-399 (Nov. 30, 1979); App. at 59, are not specifically authorized by a provision of the FMSA.

[26] *See* maj. op at 19.

[27] *Helen Mining Co.* at 7; App. at 23.

opinion takes note of several observations made by committees of the Congress or by individual members on the floor that demonstrate the importance attached to miner participation in inspections and walkaround pay.[28] These observations are irrefutable, but they are at best marginally relevant to the question posed by these cases, which is the scope of the walkaround pay right. As the intervening mine operators note, the nonprovision of walkaround pay in cases of spot inspections is not inconsistent with the safety and health aims that underlie the FMSA.[29] Spot inspections are typically highly technical in nature and limited in time and scope; it is clear that the Congress could quite reasonably have decided that walkaround pay was not needed as an incentive to encourage miner participation in these sorts of inspections.

There is, admittedly, little in the legislative record on the specific question of walkaround pay. As the Commission noted,[30] the House and Senate bills considered at Conference diverged in their walkaround pay provisions; the Senate bill included a walkaround pay provision attaching to the physical inspections of mines "under subsection (a)," while the House bill simply continued the walkaround rights of miners under the 1969 legislation without the provision of compensation for the time so expended.[31] The written report of the conferees

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[28] *See* maj. op. at 21-23.

[29] Brief for Intervenor-Respondent Helen Mining Company at 20-23; Brief for Intervenor-Respondent Kentland Elkhorn Coal Corporation at 21-23.

[30] *Helen Mining Co.* at 8; App. at 24.

[31] *Compare* S. 717, § 104(e), 95th Cong., 1st Sess. (1977), *reprinted in* SUBCOMMITTEE ON LABOR OF THE SENATE COMMITTEE ON HUMAN RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 1115 (1978) [hereinafter LEG. HIST.], *with* H.R. 4287, 95th Cong., 1st Sess. (1977), *reprinted in* LEG. HIST. at 1178-82, *reprinted as substituted for the Senate bill*, LEG. HIST. at 1260-75.

stated that "[t]he conference substitute conforms to the Senate bill."[32] The relevant language was, however, changed from that noted above to the "pursuant to" language of subsection 103(f), without additional comment.[33]

No member of the Senate made relevant observations on the scope of the right to walkaround pay after the Conference.[34] One member of the House did, however, address this issue specifically and unambiguously. Representative Carl Perkins, chief sponsor of the House version of the FMSA and chief House conferee, made the customary oral report to the House setting forth the details of the Conference substitute. Given the unambiguous and unconditional nature of his remarks, they are worth quoting at some length:

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.
>
> • • • •
>
> Section 103(f) provides that a miners' representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to

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[32] CONFERENCE REPORT ON THE FEDERAL MINE SAFETY AND HEALTH AMENDMENTS ACT OF 1977, S. REP. NO. 461, 95th Cong., 1st Sess. 45 (1977), *reprinted in* LEG. HIST. at 1323.

[33] The majority summarily opines that this revision was "insignificant," and then deals with it no further. Maj. op. at 20 n.29. I find this approach surprising—and a bit disingenuous—since the Commission clearly felt that the change was significant. *See Helen Mining Co.* at 8; App. at 24. Even if the members of the majority disagree with the Commission on this point, it would seem preferable to confront more forthrightly the change of language than to dismiss it in a footnote as "insignificant."

[34] *See Helen Mining Co.* at 10; App. at 26.

section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-conferences, at no loss of pay *only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety*, including pre- and post-inspection conferences.

• • • •

Since the conference report does not refer to *any inspection*, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and *not* for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator.[35]

It is apparent, as the Commission noted, that Representative Perkins believed that the conferees intended "to preserve the right under the 1969 Act to accompany the inspector on all inspections, but to accord a walk-around pay right only for regular inspections."[36]

The majority discounts, as it must to preserve its position, the remarks of Representative Perkins. Judge Greene's first complaint with them is that the statute is so clear and Representative Perkins so off the mark that the comments may not even be considered. Although I will address later this ostrich-like use of the plain

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[35] 123 CONG. REC. 35,410 (daily ed. Oct. 27, 1977) (remarks of Rep. Perkins, *reprinted in* LEG. HIST. 1356-58) (emphasis added).

[36] *Helen Mining Co.* at 10; App. at 26.

language doctrine,[37] suffice it here to say that I find it difficult to believe that any objective reader could fail to conclude that subsections 103(a) and (f) are so ambiguity-ridden as to call out for clarification.

Turning to the matter of the proper weight to be accorded Representative Perkins' statement, the majority faults the Commission for attributing "overwhelming weight" to the remarks.[38] Citing the usual litany of authorities employed to explain away the contradictory comments of a legislator, the majority effectively reads Mr. Perkins' observations out of the record; far from attributing any significant weight to his remarks, the majority attaches no weight to them whatsoever.

I share the Commission's view, however, that Representative Perkins' remarks are the best index of congressional intent in this case. He was, of course, not simply stating his personal viewpoint on the construction of subsection 103(f); he was, rather, conveying his understanding of the intention of *both* the House and Senate conferees on the agreed-upon meaning of the revised walk-around pay provision. As the Commission noted, Mr. Perkins' statement was detailed, unambiguous, and uncontradicted, and was delivered "solely to inform the House of the conferees' agreement."[39]

How, then, does the majority avoid the otherwise devastating thrust of Representative Perkins' statement? It does so largely through adoption of a blindly chronological approach: because the Perkins statement was delivered three weeks after the Senate had acted on the Conference substitute, his remarks could not "in any sense" be regarded as reflecting the will of the Senate.[40] That

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[37] *See* pp. 18-19, *infra*.

[38] Maj. op. at 15.

[39] *Helen Mining Co.* at 10; App. at 26.

[40] Maj. op. at 16.

conclusion, any way one examines it, is flatly wrong. It is, to begin with, wrong as a matter of fact; Mr. Perkins was attempting to explain to a confused House what the conferees perceived the meaning of subsection 103(f) to be. By definition, some of the conferees were from the Senate, and, though hardly dispositive, not one of them has ever taken issue with Representative Perkins' remarks. Thus, the Congressman's statement might well reflect precisely the will of the Senate conferees—that the Senate had already voted on the Conference substitute is irrelevant in evaluating the significance of Mr. Perkins' perception of the understandings reached at the Conference.

Second, the majority's chronological observations prove a bit too much. There are, we should remember, two Houses of Congress, and Representative Perkins made his remarks at a crucial stage in the House deliberations on the FMSA. As such, we must assume that his remarks were familiar to the representatives and influenced their voting decisions on the Conference bill. Accordingly, we have a situation in which, at the very least, one House of Congress has acted on the basis of a certain understanding of statutory language. It would seem incumbent on the majority to respond directly in refutation of Representative Perkins' remarks, instead of using maxims of statutory construction to dodge difficult issues. Indeed, I find this reluctance to accord any weight to Representative Perkins' remarks puzzling in light of a recent observation made by a member of today's majority on a similar matter of construction.[41]

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[41] In her dissent in Demby v. Schweiker, No. 81-1862 (D.C. Cir. Dec. 15, 1981), Judge Wald relied heavily on the subsequent remarks of a member of a congressional conference committee to explain what was done at the conference. Indeed, the similarity between the factual situation in that case and ours today and between her observations there and mine now is striking. *See id.*, slip op. at 7-8 & n.11 (Wald, J., dissenting). She noted that her interpretation of the provisions in

The majority also dismisses Mr. Perkins' statement on the ground that acceptance of it would permit the views of a single legislator to alter unilaterally the "meaning of the bill."[42] I find this objection somewhat peculiar, inasmuch as it is rather clear that in the congressional process one House *always* acts first; by so acting, the chamber that first takes action does *not* deprive the other of the right to hold meaningful views on the construction properly accorded the statutory language. The two Houses of Congress often act independently, and the views of one body do not bind the legislators in the second. Each member of both Houses has the opportunity to comment on pending provisions, and statements so made are entitled to weight regardless of their chronological order.

Finally, the majority's citation of *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 828 (D.C. Cir. 1980), is inapposite. This is not a case in which an "interest group" has succeeded in having a self-serving statement inserted in some oblique corner of the legislative record; rather, we have the leading House sponsor of the proposed legislation commenting on the meaning he believes the Conference members ascribed to certain language.

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question was "supported by the only piece of legislative history we have about the meaning of the Conference Report." *Id.* at 7. The relevant congressional remarks were made by Senator Schmitt, whom she noted "had a special concern with the compromise struck by the conferees, and his remarks offered a comprehensive account of [the subject matter] . . . ." *Id.* But most interesting are her observations on the weight properly attached to Senator Schmitt's statements:

> Obviously, his statement is not conclusive evidence of Congressional intent, but neither can it be totally ignored as the contemporaneous expression of the Senate Conference Committee member most involved with and knowledgeable about the program items involved in this case.

*Id.* at 7-8. I could not agree more with this assessment.

[42] Maj. op. at 16.

Having considered the majority's analysis of the weaknesses of Representative Perkins' statements, let us consider briefly why the Commission ruled that his remarks should be given considerable weight in this process of construction. First, Representative Perkins hardly made his remarks as the quintessential uninvolved, "single legislator"; rather, he acted as chairman of the House committee that reported the bill and as leader of the House conferees who participated in its revision. Mr. Perkins was the chief House conferee and as such was intimately familiar with the legislation; his statement was made on the basis of his understanding of the intentions of both the House and Senate members of the Conference. It is well-established that statements on the floor by the committee member in charge of a bill "are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports." [43] Mr. Perkins' remarks fit squarely in this category, and the majority's conclusory attempt to diminish their significance plainly fails.

Second, we should not forget the role played by Representative Perkins in the area of mine safety and health regulation. As the Commission noted in *Helen Mining Co.*, Mr. Perkins has for many years been a leader in this field, and was a principal sponsor of both the 1969 and 1977 mine safety bills.[44] As such, the majority's attempt, in effect, to contradict Mr. Perkins on this score is somewhat akin to art critics attempting to explain to Michelangelo the "meaning" of the scenes on the ceiling of the Sistine Chapel.

By way of summary, I believe that Representative Perkins' remarks were properly weighted by the Commission. His statement was clear, directly on point, and pre-

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[43] 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 48.14 at 220 (4th ed. 1973).

[44] *Helen Mining Co.* at 10; App. at 26.

pared with great care; equally important, there is not the slightest contradiction of the details of his remarks at any place in the legislative history.

## III.

We come, then, to the final and critical issue in this case: is the majority correct in its use of the plain language doctrine to reject the Commission's "middle-ground" construction of the FMSA? As a threshold matter, I believe that the majority fails to accord sufficient deference to the interpretation given by the Commission to the statute it has been charged to interpret. The Congress clearly *divided* the lawmaking and policymaking functions between the Secretary of Labor and the Commission, and it is apparent that some deference is owed a decision of the Commission even when it diverges from the position of the Secretary. The analogy noted by the Commission between the policymaking structure under the FMSA and that under the Occupational Safety and Health Act (OSHA) is distinct, and cases articulating the relationship between the Secretary of Labor and the Occupational Safety and Health Review Commission are accordingly apposite in the FMSA context.[45] The Commission concluded that the Secretary's views were to be accorded "special weight," and that standard seems about right, albeit a bit amorphous. The critical point, however, is that the Commission's construction of its governing statute must be accorded some weight, even when its position differs from that of the Secretary's; otherwise, the Commission would be "little more than a specialized jury, an agency charged only with fact finding."[46] I believe that Congress intended a more active role for the Commission.

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[45] *Helen Mining Co.* at 4-6; App. at 20-22.

[46] Brennan v. Giles & Cotting, Inc., 504 F.2d 1255, 1262 (4th Cir. 1974) (OSHA context).

The majority renders the Commission's decision devoid of weight in this case, however, by concluding that its construction is "plainly incorrect and unsupportable," and therefore not entitled to deference.[47] It bases this conclusion on the ground, discussed above, that the scope of walkaround pay is "clearly coextensive" [48] with the basic walkaround right itself, and that the Commission's bifurcation of the two rights is erroneous.

I disagree. In my opinion the majority's focus on, in effect, a single sentence masks more of the meaning of subsection 103(f) than it reveals. I understand fully how the relevant sentence could *alone* be construed in the way that my colleagues and a dissenting member of the Commission understood it.[49] I submit, however, that when one examines the language of the entire section—as I believe should be done—it is apparent that the "plain language" is not at all plain and that the FMSA does not mandate congruence of compensation and walkaround rights. We have recently had occasion to note that courts, in construing statutory language, should " 'not be guided by a single sentence or member of a sentence, but [should]

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[47] Maj. op. at 17-18 n.26.

[48] *Id.* at 13.

[49] Although two members of the five person Commission dissented in *Helen Mining Co.*, only one, Commissioner Lawson, construed the relevant language precisely as does the court today. *See Helen Mining Co.* at 24-31; App. at 40-47 (Lawson, Comm'r, dissenting). Commissioner Jestrab agreed that spot inspections gave rise to miner compensation rights, but concluded that the FMSA drew an implied distinction between the "frequent inspections" that he felt were authorized by § 103(a) and certain "additional inspections" that the Secretary of Labor might conduct that were not. That the two dissenting members of the Commission could not even agree on the question of which inspections were conducted "pursuant to . . . subsection (a)" demonstrates to me the senselessness of ignoring the only relevant remarks in the legislative history and the sheer folly of the majority's contention that the meaning of § 103(f) is plain.

look to the provisions of the whole law, and to its object and policy.'" [80] Looking at the *"whole law,"* I believe that the bifurcation so emphatically condemned by the majority is, in fact, consistent with the statutory language.

To be sure, my interpretation of the relevant wording is but a simple conclusion, as is, I might note, the majority's construction. Like the Commission, however, I simply do not read the words in question as inextricably linking compensation and walkaround rights. The confusing language employed by Congress throughout section 103 makes decisive reliance on a single sentence in that provision, without the guiding assistance of relevant observations by a member of Congress, a risky endeavor, and I decline to join my colleagues in following that course. Ambiguity pervades subsection 103(f), and it seems to me most strange that the court turns away in this case from the legislative materials most relevant to the clarification of the ambiguity. The plain language doctrine does not require studied ignorance of enlightening congressional statements.

More could be said, but enough already has. I believe that the Commission correctly construed the FMSA, and I accordingly dissent.

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[80] Crooker v. Bureau of Alcohol, Tobacco & Firearms, No. 80-1278 (D.C. Cir. Dec. 8, 1981) (en banc), slip op. at 24, *quoting* Richards v. United States, 369 U.S. 1, 11 (1962) (footnote omitted), *quoting* Mastra Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 285 (1956), *quoting* United States v. Boisdore's Heirs, 8 How. 113, 122 (1850).

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

1730 K Street N.W. 6th Floor
Washington, D.C. 20006

Docket No. PITT 79-11-P

SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION

v.

THE HELEN MINING COMPANY

November 21, 1979

## DECISION

The question here is whether a mine operator must pay a miners' representative for the time he spends accompanying a mine inspector during a "spot" inspection required by section 103(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ["the 1977 Act" or "the Act"]. Administrative Law Judge Merlin answered that question in the negative. We affirm.

## I.

On April 3, 1978, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) began a lengthy inspection of the entirety of an underground mine operated by Helen Mining. The inspection was completed almost three months later, on June 27, 1978. This type of inspection, which is commonly called a "regular inspection" or "regular entire mine inspection," is required to be made at

least four times a year by the third sentence of section 103(a) of the 1977 Act. [1]

On April 6, 1978, the inspector interrupted the regular inspection to conduct a spot inspection required by section 103(i). That section requires the Secretary of Labor to conduct at least one "spot" inspection during every five working days at irregular intervals of every mine that liberates excessive quantities of methane. This was such a mine. The inspector concentrated his efforts on areas where methane could accumulate, and attempted to determine the amount of ventilation in those areas. He tested for methane concentrations with a methanometer and for air velocity with an anenometer; these are generally the only tests made during a spot gas inspection.

Before the spot inspection began, the inspector notified Helen Mining officials and representatives of the miners of his intention to interrupt the regular inspection to conduct a spot inspection. Helen Mining's safety director told the miners' representative, Mr. McAfoos, that he would not be paid for the time he spent accompanying the inspector on the spot inspection. Mr. McAfoos decided to accompany the inspector anyway because he thought that his union would compensate him. The spot inspection consumed about five hours; Mr. McAfoos, a mechanic, left after three hours to assist in the repair of a continuous mining machine.

Helen Mining did not include payment in Mr. McAfoos' next pay check for the three hours he spent accompanying the inspector. When the inspector learned of this from Mr. McAfoos, he issued a citation under section 104(a) alleging a violation of section 103(f). When Helen Mining again declined to compensate Mr. McAfoos, the inspector issued a withdrawal order under section 104(b) for failure to abate; the withdrawal order did not require the withdrawal of miners from mining operations, however. The Secretary later sought from the Commission the assessment of a penalty against Helen Mining

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[1] Section 103(a) of the 1977 Act is reproduced at pages 2-3, *infra*.

for its alleged violation of section 103(f), and a hearing was held before Administrative Law Judge Merlin. Helen Mining argued to Judge Merlin that because section 103(f) required "walkaround pay" only for inspections made pursuant to section 103(a), and the spot inspection here was made under section 103(i), it was not required to pay Mr. McAfoos. The Judge concurred in this view; he held that no violation had occurred and he therefore did not assess a penalty. The Secretary filed a petition for discretionary review, which the Commission granted on April 11, 1979. On July 31, 1979, we heard oral argument.

The first and third sentences of section 103(f) of the 1977 Act read as follows:

> [1] Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any . . . mine *made pursuant to the provisions of subsection (a) [of section 103].* . . . [3] Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. [Sentence numbers and emphasis added.]

Section 103(a) reads in part as follows:

> [1] Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in . . . mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. [Second sentence omitted.] . . . [3] In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground . . . mine in its entirety at least four times a year, and of each surface . . . mine in its entirety at least two times a year. [4] The

> Secretary shall develop guidelnes for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. [5] For the purpose of making any inspection or investigation under this Act, the Secretary, or any authorized representative of the Secretary, . . . shall have a right of entry to, upon, or through any . . . mine [Sentence numbers added.]

Before Judge Merlin, the Secretary relied upon an MSHA interpretative bulletin, 43 Fed. Reg. 17546 (1978), to argue that the spot inspection here was made pursuant to section 103(a) because it was made for purposes stated in the first sentence of section 103(a)—to determine whether imminent dangers or violations existed. The Judge, however, concluded that if this view were adopted, all inspections would be inspections under section 103(a) and that the phrase "pursuant to the provisions of [section 103(a)]" in the first sentence of section 103(f) would be rendered meaningless. He held that the MSHA interpretative bulletin was not binding upon him,[2] and he further found that the Secretary's position was contrary to a clear statement on this point in the legislative history of section 103(f).

II.

We examine at the outset the Secretary's objection that Judge Merlin failed to accord "proper deference" to MSHA's interpretative bulletin. The Secretary relies primarily on *Certified Color Manufacturers Ass'n* v. *Mathews*, 543 F.2d 284, 294 (D.C. Cir. 1974), where the court stated that "review is guided by the considerable deference traditionally owed the interpretation of a statute by the head of the agency charged with its administration", and *NYS Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973), where the Supreme Court

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[2] The Judge cited *Bituminous Coal Operators Ass'n* v. *Marshall*, 82 F.R.D. 350, 353 (D.D.C. 1979), *appeal docketed*, No. 79-1279 (D.C. Cir., March 13, 1979).

observed that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ." *Id.* at 421, *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); and *Dandridge* v. *Williams*, 397 U.S. 471, 481-482 (1970).

The difficulties with the Secretary's argument are that it ignores the language and structure of the 1977 Act, that it fails to recognize the proper roles of the Commission and the Secretary, and that it would, if adopted, frustrate the purposes for which Congress established the Commission as a wholly independent agency. Under the Secretary's view, the Commission could not study a problem afresh and make an independent judgment on matters of law and policy. Its task would be little more than to find the facts, accord considerable deference to the Secretary's position, and determine whether there are compelling indications that his construction of the 1977 Act is wrong. Congress, however, invested the Commission with the authority to decide questions of both law and policy (sections 113(d) (2)(A)(ii) and (d)(2)(B)), and it intended that the Commission do so independently.

The Senate committee that drafted the bill from which the 1977 Act was largely derived, S. 717, 95th Cong., 1st Sess. (1977), considered several alternatives to the establishment of an independent Commission. It considered and rejected the arrangement under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 (1976) (amended 1977) ["the 1969 Act"], in which adjudication as well as prosecution, investigation, and standards-making were all placed in the hands of the Secretary of the Interior. Although the Secretary of the Interior had delegated his adjudication responsibilities under the 1969 Act to the Office of Hearings and Appeals and the Board of Mine Operations Appeals, the Board nevertheless was not independent of the Secretary of the Interior.[3]

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[3] For example, the Board held that it was not free to apply its own precedent in the face of a Secretarial Order expressing a contrary view. *Republic Steel Corp.*, 5 IBMA 306, 309-311, 1975-76 OSHD ¶ 20,233 (1975) ("policy of the Department, as established by the Acting Secretary"), *rev'd on other grounds*, 581 F.2d 868 (D.C. Cir.

The Senate committee followed instead the example that Congress had set under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* That statute established the Occupational Safety and Health Review Commission, which has been recognized as an independent agency with a law- and policy-making role. *See, e.g., Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262, 1266-1267 (4th Cir. 1974). The Senate committee bill thus established this Commission under the 1977 Act as an independent agency with an express policy role.[4] Senator Williams, the chief architect of the Senate bill, confirmed the important role of the new Commission, when, while introducing the Senate bill, he stated to the Senate that under the bill "[t]he procedure for determining operator re-

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1978), *withdrawal order aff'd on remand*, 1 FMSHRC 5, 1 BNA MSHC 2002, 1979 OSHD ¶ 23,455 (1979), *pet. for rev. filed*, No. 79-1491 (D.C. Cir., May 11, 1979); *Cowin & Co.*, 6 IBMA 351, 365, 1976-77 OSHD ¶ 21,171 (1976), *remanded on other grounds*, No. 76-1980 (D.C. Cir., May 26, 1978), *withdrawal order aff'd*, 1 FMSHRC 20, 1 MSHC 2010, 1979 OSHD ¶ 23,456 (1979). When the Board decided a group of major cases against the Mining Enforcement and Safety Administration, the Secretary of the Interior stayed the Board's decisions and proceedings under the "supervisory powers" he reserved to "render the final decision [in any case]." 43 CFR § 4.5 (1977); Secretarial Order of January 19, 1977, staying effect of *Eastern Associated Coal Corp.*, 7 IBMA 133, 1976-77 OSHD ¶ 21,373 (1976) (on reconsideration *en banc*), and staying proceedings in nine other cases.

[4] *See* S. Rep. 95-181, 95th Cong., 1st Sess., at 47 (1977) ["S. Rep."], *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 653 (1978) ["1977 Legis. Hist."].

sponsibility and liability is assigned to a truly independent . . . Commission. . . ." 1977 Legis. Hist. at 89.[5]

The cases cited by the Secretary are inapposite. They deal with the deference that federal courts often accord to those administrative agency heads who alone have been entrusted by Congress with all administrative and policy functions under a statute. The Commission, however, is not entirely in the position of a court and the Secretary is not in the position of most agency heads. Inasmuch as the 1977 Act divides administrative and policy responsibilities between the Commission and the Secretary, neither has exclusive expertise in the subject matter covered by the 1977 Act. See our decision in *Old Ben Coal Company*, No. VINC 79-119 (October 29, 1979) (slip op. at 5).

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[5] We also note Senator Williams' statement during our confirmation hearings as indicative of the Commission's intended role. Senator Williams stated:

* * *

> One of the essential reforms of the mine safety program is the creation of an independent Federal Mine Safety and Health Review Commission charged with the responsibility for assessing civil penalties for violations of safety or health standards, for reviewing the enforcement activities of the Secretary of Labor, and for protecting miners against unlawful discrimination.
>
> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilties under the law. When the Secretary and mine operators understand precisely what the law expects of them, they can do what is necessary to protect our Nation's miners and to improve productivity in a safe and healthful working environment.

* * *

Nomination Hearing, Members of Federal Mine Safety and Health Review Commission, Before the Senate Committee on Human Resources, 95th Cong., 2d Sess., 1 (1978).

Our position is buttressed by the conclusion reached by the Fourth Circuit when it examined the similar relationship between the Occupational Safety and Health Review Commission and the Secretary of Labor. In *Gilles & Cotting*, *supra* at 5, the court rejected an attempt by the Secretary to reduce that Commission to "little more than a specialized jury, an agency charged only with fact finding." It found that that Commission "was designed to have a policy role and its discretion therefore includes some questions of law." 504 F.2d at 1262. The Occupational Safety and Health Review Commission has itself adopted a similar view of its role under OSHA. *United States Steel Corp.*, 5 BNA OSHC 1289, 1294-1295, 1977-78 OSHD ¶ 21,795 (1977).

Finally, the Secretary relies upon the legislative history of the 1977 Act for support for his position. Although that history states that the Commission is to accord weight to the Secretary's views, it does not support the more far-reaching result that he seeks here. The Senate committee report states only that because the Secretary "is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. at 49; 1977 Legis. Hist. at 637. The most apposite and well reasoned precedent does not require the Commission to accord to the Secretary's view of the statute the degree of deference he claims here, however. Moreover, the Senate committee did not state that the Secretary's views are entitled to "considerable deference" or are to be controlling unless there are compelling indications that they are wrong. The Senate committee stated only that "weight" is owed. The Secretary's broader reading is inconsistent with the Senate committee's and Congress' intention that the Commission be truly independent of the Secretary and with the policy role that the 1977 Act entrusted to the Commission.

In accordance with this expression of congressional intent, we will accord special weight to the Secretary's view of the

1977 Act and the standards and regulations he adopts under them. His views will not be treated like those of any other party, but will be treated with extra attention and respect. Although this weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution, or standards-making activities, it will not rise to the inappropriate level the Secretary has sought here. The issue in this case is one of statutory interpretation. Resolution of such questions is a primary role of the Commission. With this in mind, we now turn to the merits of this case.

III.

The starting point of our discussion of this matter of first impression is the language of the statute. *Southeastern Community College* v. *Davis*, 99 S.Ct. 2361, 60 L.Ed. 2d 980, 987-988 (1979). Both parties claim that the plain language of the statute unambiguously supports their opposing views.[6] We find that the statute is ambiguous and does not clearly favor either position.

As Judge Merlin observed, adoption of the Secretary's view would render meaningless the phrase "pursuant to the provisions of subsection (a)" in the opening sentence of section 103(f). The Secretary has also offered no satisfactory explanation of why Congress used the phrase "any inspection" in sections 103(a), 104(g)(1) and 107(a) of the 1977 Act, why it did not carry over that phrase from the walkaround provision of

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[6] Inasmuch as both parties also claim that the legislative background or history favors their positions, we need not in any event consider only the plain language of the Act no matter how clear it may appear on superficial examination. *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976).

the 1969 Act,[7] and why it instead used "pursuant to the provisions of subsection (a)" in the 1977 Act.

Even if we were to overlook this infirmity in the Secretary's argument, the text and structure of the 1977 Act would still not clearly support his view. Several different types of inspections are described in sections of the 1977 Act other than section 103(a). See sections 103(g)(1), 103(i), 202(g), and 303(x).[8] The only inspection that section 103(a) describes specifically, however, is the regular inspection, which is not described elsewhere in the Act. Thus, even if the Secretary were correct in arguing that the third and fourth clauses of the first sentence of section 103(a) encompass all types of inspections, one could still reasonably believe that the phrase "pursuant to the provisions of subsection (a)" in section 103(f) was intended to accord the right to walkaround pay to the only inspection specifically and exclusively described in section 103(a)—the regular inspection.

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[7] Section 103(h) of the 1969 Act read as follows:

> At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

[8] Section 103(g)(1) requires the Secretary to conduct a "special" inspection if a miner or miners' representative has reasonable grounds to believe that a violation or imminent danger exists, and gives written notice to the Secretary. Section 103(i) requires the Secretary to make "spot" inspections at stated intervals of mines liberating excessive quantities of explosive gases, of mines in which a gas ignition or explosion has occurred in the past five years that caused death or serious injury, and of mines with some other especially hazardous condition. Section 202(g) requires the Secretary to make frequent "spot" inspections to obtain compliance with the health standards in Title II of the Act. Section 303(x) requires the Secretary to inspect a formerly inactive or abandoned mine before mining operations commence.

The construction offered by the operators is also problematic, however. Helen Mining conceded during oral argument that if its construction of the statutory language is followed, miners would have no right to accompany inspectors even without pay in other than regular inspections. Under this construction, miners would have fewer walkaround rights under the 1977 Act than coal miners had under the 1969 Act. We share the Secretary's grave doubts that this was what Congress intended.

The legislative history of the walkaround provisions of the 1977 Act clarifies the matter, however. Although a walkaround pay right had been written into the Senate bill, the House bill merely continued the right in the 1969 Act to accompany the inspector and did not expressly provide for walkaround pay.[9] The conflicting bills were referred to a conference committee which reported its bill to the House and Senate. The conferees' written report stated only that "[t]he conference substitute conforms to the Senate bill."[10] The conference committee did, however, change the opening sentence of what is now section 103(f) by striking the phrase "physical inspection of any mine *under subsection (a)*" and substituting "physical inspection of any coal or other mine *made pursuant to the provisions of subsection (a)*".[11]

Although there are no definite indications of how the Senate construed the conference or Senate bills on this point, there is clear evidence of how the Senate and House conferees construed the conference bill. Representative Perkins, the chief House conferee and the chairman of the House committee that

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[9] S. 717, § 104(e) (as passed by Senate), Legis. Hist. at 1115; H.R. 4287, 95th Cong., 1st Sess., at 78-81 (1977) (as reported), *reprinted in* 1977 Legis. Hist. at 266, 343-346; *same*, as substituted for Senate bill, 1977 Legis. Hist. at 1260, 1263-1265.

[10] S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. (1977) ["Conf. Rep."], *reprinted in* 1977 Legis. Hist. at 1279, 1323.

[11] Conf. Rep. at 10; 1977 Legis. Hist. at 1288.

drafted the House bill, made the customary oral report to the House describing the agreement reached by the conference committee. His statement on this point was as follows:

* * *

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference [bill] that seems to be somewhat ambiguous.
>
> Section 103(a) of the conference [bill] provides [in part] that. . . . [i]n carrying out the requirements of clauses (3) and (4)—concerning imminent dangers or compliance with standards—the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year and of each surface coal or other mine in its entirety at least two times a year.
>
> In addition to the regular inspections of each mine in its entirety as specified in section 103(a), section 103(g)(1) provides that whenever a representative of a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further, section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.
>
> Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference [bill] reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), *the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector,* including pre- and post-[inspection] conferences, *at no loss of pay only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety* including pre- and post-inspection conferences.

* * *

Section 103(h) of the 1969 act provided generally that--

> At the commencement of any inspection . . . the authorized representative of the miners at the mine . . . shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

> Since the conference [bill] does not refer to any inspection, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine pursuant to subsection (a), *it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator.*

* * *

1977 Legis. Hist. at 1356-1358 (emphasis added). The thrust of Mr. Perkins' statement is that it was the intention of the Senate and House conferees to preserve the right under the 1969 Act to accompany the inspector on all inspections, but to accord a walkaround pay right for only regular inspections.

The Secretary argues that Mr. Perkins' statement cannot be resorted to for the purpose of construing a statute contrary to its plain terms or its purpose. He also argues that Mr. Perkins' statement should be disregarded because it is only "an isolated remark by a single Congressman."

We are unable to share this reasoning. First, the literal language of section 103(f) does not clearly favor the Secretary's interpretation. Second, the modern rule is that legislative history can be resorted to even if statutory language is thought to be clear. See note 6, *supra*. Third, Representative Perkins was not merely setting forth his personal opinion of how section 103(f) should be interpreted. He was stating the intention of the conference committee, and was therefore speaking as

more than a "single Congressman." Moreover, as the Secretary and others familiar with mine safety and health legislation are well aware, Representative Perkins has always been more than a "single Congressman" in this field. As a principal sponsor of both the 1969 and 1977 Acts, chairman of the House Committee on Education and Labor during their consideration and passage, and chief conferee for the House when both statutes were given final form in conference committees, Mr. Perkins was instrumental in the passage of the 1969 Act and highly influential in the passage of the 1977 Act. Mr. Perkins' statement was clear, detailed, and prepared with obvious care. It was carefully delivered solely to inform the House of the conferees' agreement. We also note that the Secretary has not pointed to, nor have we found, a subsequent statement by any conferee or other member of Congress that the walkaround pay right extends beyond regular inspections, or disavowing Mr. Perkins' statement of the conferees' intention. *Compare Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 23 (1976), *with American Smelting & Refining Co.* v. *O.S.H.R.C.*, 501 F.2d 504, 510 (8th Cir. 1974).

We conclude that Mr. Perkins' statement of the conference committee's intention is dispositive here. Not only is Mr. Perkins' statement the only passage in the legislative history that speaks specifically to this question and clarifies an ambiguity in the statute, but, more importantly, it reflects the conferees' understanding of the walkaround pay right and is therefore the basis upon which the conferees agreed to it. [12] Inasmuch as our

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[12] When the two Houses of the 95th Congress were considering mine safety and health legislation, there were not, as there sometimes is, identical or closely similar bills reported out of committee in each House. The House and Senate bills were in many respects quite different. On the matter of walkaround pay, they were very different, for the bill passed by the House had no walkaround pay provision. When these very different bills were referred to a conference committee, the conferees were faced with reconciling many important differences between the two bills. The complexity of the task is

purpose is to ascertain and effectuate the legislative intent (*Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975)), and Mr. Perkins' clear and unequivocal statement of the conference committee's understanding is the best guide to that intent, we follow it here.

Accordingly, the judge's decision is affirmed.

/s/ Jerome R. Waldie

JEROME R. WALDIE, Chairman

/s/ Richard V. Backley

RICHARD V. BACKLEY, Commissioner

/s/ Marian Pearlman Nease

MARIAN PEARLMAN NEASE, Commissioner

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indicated by the length and detail of the 31-page report. It is therefore quite understandable that not all conferees' agreements or understandings were discussed in the conference report, especially on a point that did not go to the heart of the proposed legislation. The conference report itself stated that the "*principal* differences between the Senate bill, the House [bill] and the [conference bill] are noted below." Conf. Rep. at 37; 1977 Legis. Hist. at 1315 (emphasis added). And isasmuch as the House conferees largely receded and agreed to the Senate bill over the House bill, it is quite understandable that when Mr. Perkins introduced the conference bill to the House he felt it necessary to make to the House a more detailed presentation of the conferees' actions.

Jestrab, Commissioner, dissenting:

In the Petition for Discretionary Review granted by Order dated October 29, 1979 in *Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Arnold J. Sparks, Jr., Applicant* v. *Allied Chemical Corporation, Respondent*, Docket No. WEVA 79-148-D (September 27, 1979), now pending before the Commission, the Petitioner, Allied Chemical Corporation argued that that case and *Kentland-Elkhorn Coal Corporation* v. *Secretary of Labor*, PIKE 78-339 (March 8, 1979), likewise pending before the Commission, and this case contain a common question of law. I think this is correct. *Allied* argued extensively in its petition that based upon a reading of the statute and its legislative history, the decision of Judge Merlin here was correct, and that the decision of Judge Kennedy in *Allied* was wrong. I disagree. I dissent here for reasons set out in the Decision and Order of Administrative Law Judge Kennedy in *Allied Chemical Corporation* above. For convenience of counsel in this case, the Commission's administrative law judges, and the Bar the portion of Judge Kennedy's opinion which I think relevant, follows:

. . . .

> At issue in this litigation is the extent of miner's walkaround rights, i.e., the right to accompany an inspector and to receive normal compensation while doing so. This right is recognized in section 103(f), 30 U.S.C. § 813(f), of the Act, which provides that a representative of the miners shall be given an opportunity to accompany an inspector for the purpose of aiding in the "inspection of any coal or other mine made pursuant to [section 103(a)].[2] Any such

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[2] Section 103(f), 30 U.S.C. § 813(f), of the Act provides:

"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized

representative of the miners who is also an employee of the operator "shall suffer no loss of pay during the period of his participation in the inspection." Respondent contends that there are certain types of inspections to which the right to compensation does not attach, in particular, spot inspections for extrahazardous conditions pursuant to the mandate of section 103(i).

The scope of the Secretary's mine inspection authority is delimited by section 103(a),[3] which directs "frequent"

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miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

[3] Section 103(a), 30 U.S.C. § 813(a), of the Act reads in pertinent part:

"Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance

inspection of all mines for four purposes: (1) to obtain information relating to health and safety conditions and the causes of accidents; (2) to gather information relating to mandatory standards; (3) to determine whether imminent dangers exist; and, (4) to determine compliance with mandatory standards, citations, orders, or decisions. With respect to imminent dangers and compliance, the Secretary is directed to inspect each mine "in its entirety at least" four times per year for underground mines and two times per year for surface mines. In addition to this minimum requirement for complete inspections, the Secretary is directed to establish guidelines for additional inspections based on his experience under the Mine Act "and other health and safety laws."

Thus, it is apparent that the substantive authority for carrying out inspections for the purpose of obtaining information and insuring compliance is to be found in section 103(a). The regular compliance inspections are to be carried out frequently, but, in no event less than two or four times yearly.

In addition to the minimum requirements for compliance inspections, two other subsections establish special procedures for triggering inspections for compliance and information. Section 103(g)(1)[4] provides that at the

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notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws."

[4] Section 103(g)(1), 30 U.S.C. § 813(g)(1), of the Act reads in pertinent part:

"Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

request of a representative of the miners who has reasonable grounds to believe that a violation or imminent danger exists an immediate special inspection may be had. Section 103(i) [5] provides for "spot" inspections for methane accumulations in gassy mines and for "other especially hazardous conditions" on an accelerated schedule.

Respondent takes the position that the compensation right under section 103(f) extends only to the minimum of four mandatory inspections "of the mine in its entirety," and that any other or additional inspections are without the coverage of the section. Maintaining that these "regular" inspections are the "only inspections made pursuant to Section 103(a)" (Brief, p. 5), respondent asserts that only a representative of miners participating in such a "regular" inspection is entitled to be paid. Respondent claims that since the inspection giving rise to the instant complaint was made pursuant to section 103(i), and since "there is no requirement in Section 103(i) that the operator pay a representative of miners for participation in such

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[5] Section 103(i), 30 U.S.C. § 813(i), of the Act reads:

"Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, 'liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals."

a spot inspection" (*id.*), the miner Sparks is not entitled to compensation.

The Secretary, on the other hand, takes the position that the language of the compensation provision of section 103(f) clearly and unambiguously encompasses all inspections carried out for the purposes enumerated in the four clauses of the first sentence of section 103(a). Relying on the Interpretative Bulletin of April 25, 1978, 43 F.R. 17546, the Secretary maintains that the "inclusion of a statutory minimum number of inspections at each mine is no more than an additional requirement, clearly directed at the Secretary, which does not affect the participation right." 43 F.R. at 17547. Therefore, the Secretary concludes that because they are carried out for the purpose of obtaining information or determining whether imminent dangers, violations or especially hazardous conditions exist, the inspections triggered by sections 103(i) and (g)(1) "are clearly conducted 'pursuant to' section 103(a)." *Id.*

In support of its position, respondent cites two previous decisions by administrative law judges which concluded that operators are not required to pay employees who accompany MSHA inspectors on other than the "regular," *i.e.*, entire mine inspections. *Kentland-Elkhorn Coal Corporation* v. *Secretary of Labor*, PIKE 78-339 (March 8, 1979), appeal pending; *Secretary of Labor* v. *Helen Mining Company*, PITT 79-11-P (April 11, 1979), appeal pending.

In *Kentland-Elkhorn*, an MSHA electrical specialist conducted an inspection of the operator's preparation plant. At the time of this inspection, another inspector was in the process of carrying out one of the "regular" inspections of the mine in its entirety. That inspector was accompanied by a miner who was paid. The electrical specialist was also accompanied by a representative of the miners, and upon the operator's refusal to pay that miner, a citation and subsequently a withdrawal order issued. In a review proceeding, the operator contended that section 103(f) only grants miner representatives the right to participate in an inspection without suffering loss of pay during a "regular" inspection of the entire mine and since the inspection at issue was a spot electrical inspection, it had properly refused to pay the miner. The administrative law judge agreed with these contentions and held that the right to participate without loss of pay is limited to "regular" inspections of the entire mine.

A similar conclusion was reached in *Helen Mining Company, supra*, with respect to a spot inspection required by section 103(i). Since the mine involved in that case was particularly gassy, it had to be frequently inspected for possible accumulations of methane. The inspector involved had been in the process of making one of the "regular" inspections of the mine in its entirety during the previous 3 days, but he interrupted this inspection so that he could investigate areas where accumulations of methane might exist in order to determine whether those areas were adequately ventilated. The inspector was informed that the representative of the miners who accompanied him on the methane inspection would not be paid, whereupon a citation and subsequently a withdrawal order issued. At the hearing, the operator contended that section 103(f) only requires that the miner representative who participates in an inspection of the entire mine must be paid.[6] Again, the administrative law judge agreed with these contentions and vacated the citation and order.

Both these cases turned on the authority ascribed to certain remarks made by Congressman Perkins, Chairman of the Committee on Education and Labor. These remarks were made after the Conference Committee had made its final report and 21 days after the Senate had passed the bill.[7] In attempting to clarify what he con-

[6] The operator's argument proves too much, because if accepted it would lead to the conclusion that the miner initially requested must accompany the inspector during the whole of the entire mine inspection. Recognizing that in many cases such complete inspections take a considerable amount of time, even weeks or months, it is unrealistic to assume that one particular miner would be assigned to accompany the inspector exclusively, especially considering that no one miner possesses the expertise to assist the inspector in investigating all the areas of a large and complex mine.

[7] The Conference Committee voted to accept the Conference Report on October 3, 1977 (*Leg. Hist.* at 1279), the Senate vote to accept the Conference Report on October 6, 1977 (*Leg. Hist.* at 1347), and a Concurrent Resolution to effect corrections was agreed to on October 17, 1979 *[sic]* (*Leg. Hist.* at 1351). It was not until October 27, 1977, that Congressman Perkins made his remarks to the House. (*Leg. Hist.* at 1354). There is no evidence that Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate.

sidered to be an ambiguity in this aspect of the Conference Report, he stated that:

> Section 103(f) provides that a miner's representative * * * shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the federal inspector, including pre- and post-conferences, at no loss of pay only during the four regular inspections of each underground mine in its entirety * * *.
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> Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess (July 1978) at 1357 (hereinafter cited as *Leg. Hist.*)

This seemingly unequivocal statement concerning the intended scope of section 103(f) was, however, followed by a comparison of the cognate provisions of the 1969 Act which indicates some possible confusion on Congressman Perkins' part. He recognized that section 103(a) of the 1969 Act did not include the provision directing the Secretary to "develop guidelines for *additional inspections* of mines based on criteria including, but not limited to, * * * his experience under this act and other health and safety laws." (Emphasis added.) He then correctly pointed out that the participation right section of the 1969 Act, section 103(h), provided that a representative of the miners may accompany an inspector on "any" inspection, but that the 1969 Act did not have a compensation provision. He then went on to state:

> Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 fact, but rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the *additional inspections* otherwise required or permitted by the Act. [Emphasis added.]

*Legis. Hist.* at 1358.

Thus, a fair reading of the whole of Congressman Perkins' statement concerning the seeming ambiguity found in section 103(f) indicates that his real concern was that the right to pay for exercise of the walkaround right not be extended to the "additional inspections" permitted under the new section 103(a), but would be limited to the "frequent inspections" authorized and required by the first sentence of that section. Thus, it appears that when Congress limited the right to pay to inspections "pursuant to subsection (a)," it may have intended to exclude from that right inspections made under guidelines issued by the Secretary calling for "additional inspections," *i.e.*, inspections other than those mandated by the statute. In other words, there are two categories of inspections, statutory section 103(a) inspections and nonstatutory Secretarial inspections. Congress may well have wished to protect the operators from an unlimited expansion of the right to pay based on "additional inspections" authorized only by the Secretary and particularly where they were for the purpose of aiding in the exercise of his responsibilities under "other health and safety laws."

Indeed, the greater weight of the legislative history supports this interpretation. First, it should be noted that the provision at issue was included in the Senate version of the bill and the Joint Explanatory Statement of the Conference Committee clearly indicates that "to encourage miner participation * * * one such representative of miners, who is also an employee of the operator, [shall] be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions. The conference substitute conforms to the Senate bill." *Leg. Hist.* at 1323. It is significant to note that nowhere in the Conference committee statement is the purported limitation on the compensation right advanced by Congressman Perkins discussed or alluded to.

In the Senate's consideration of the 1977 Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits, one of the managers of the bill, explained the critical importance of the walkaround right at part of a comprehensive scheme to improve both safety and productivity in the mines:

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase

miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.

In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.

In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property to go around with an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

*Leg. Hist.* at 1054-1055.

Senator Williams, Chairman of the Committee on Human Resources, also discussed the importance of the walk-around right in the context of improving safety consciousness on the part of both miners and management:

It is the Committee's view that such participation will enable miners to understand the safety and health re-

> quirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

*Leg. Hist.* at 616-617.

In light of the broad policy expressed in the Act of protecting miners and making inspections more effective, it is difficult to understand why the isolated remarks of Congressman Perkins have been accorded so much weight. In contrast, similar remarks by other members of the House and Senate are conspicuous by their absence. It would seem that if Congress had intended by section 103(f) to create two separate categories of statutory walkaround rights, one compensable and one noncompensable, there would have been at least some debate on this departure from the general scheme of the Act. Otherwise, there exists an arguably invidious discrimination.

In any event, it is questionable whether resort to legislative history has a place in the application of the statutory language in question. *T.V.A.* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). On its face, section 103(f) is clear and unambiguous, and therefore reliance on the explanatory comments of a single Congressman appears unnecessary. *Schiaffo* v. *Helstoski*, 492 F.2d 413, 428 (3rd Cir. 1974).

It has been consistently held that as a matter of statutory construction it is error to place undue emphasis on a portion of the legislative history where to do so sacrifices the object of the legislation. "Not even formal reports—much less the language of a member of a committee—can be resorted to for the purposes of construing a statute contrary to its plain terms." *Committee for Humane Legislation* v. *Richardson*, 414 F. Supp. 297, 308 (D.D.C. 1976), *modified* 540 F.2d 1141 (D.C. Cir. 1976); *citing Pennsylvania Railroad Company* v. *Inter-*

*national Coal Mine Company*, 230 U.S. 184, 199 (1912); *F.T.C.* v. *Manager, Retail Credit Company*, 515 F.2d 988, 995 (D.C. Cir. 1975). It must be remembered that the proper function of legislative history is to resolve ambiguity, not to create it. *United States* v. *Missouri Pacific Railroad Company*, 278 U.S. 269, 278 (1929); *Montgomery Charter Service* v. *W.M.A.T.A.*, 325 F.2d 230, 233 (D.C. Cir. 1963); *Elm City Broadcasting Corporation* v. *United States*, 235 F.2d 811, 816 (D.C. Cir. 1956).

> It should be noted that these sections of the Mine Safety Act serve a broad remedial purpose, and as such should be given a liberal construction, and any asserted exceptions to those provisions should be given a strict, narrow interpretation. *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F.2d 772, 782 (D.C. Cir. 1974), *cert. denied*, 430 U.S. 938 (1975). Finally, when a statutory interpretation that promotes safety conflicts with one that serves another purpose, the first must be preferred. *District 6, UMWA* v. *IBMA*, 562 F.2d 1260, 1265 (D.C. Cir. 1977).
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> Accordingly, whether based on an analysis of the relevant legislative history or through application of accepted canons of statutory construction, I find that the reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of that subsection, and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of that subsection.
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> . . . .

I would reverse the decision of the Administrative Law Judge and remand this case for further proceedings.

/s/ Frank F. Jestrab

FRANK F. JESTRAB, Commissioner

Commissioner Lawson, dissenting:

Although I am not in disagreement with my colleague, Commissioner Jestrab, my analysis of the case before us is somewhat different from that set forth by Judge Kennedy in *Secretary of Labor et al* v. *Allied Chemical Corporation*, Docket No. WEVA 79-148-D. I am therefore setting forth my individual reasons for joining in the dissent from the views of the majority herein.

My colleagues in the majority conclude that the right to walkaround pay does not extend to all inspections made to discover violations or imminent dangers. Their holding is inconsistent with both the language and the purpose of the 1977 Act, and rests upon a single statement in the legislative history that, in the circumstances here, cannot be considered authoritative. I would hold that the right to walkaround pay applies to all inspections made to discover violations or imminent dangers and would accordingly reverse and remand this case for further proceedings.

The language of section 103(f) is straightforward. It gives miners' representatives the right to accompany the inspector "during the physical inspection of any . . . mine made pursuant to the provisions of subsection (a)" of section 103, and guarantees that the representative of miners "shall suffer no loss of pay during that period of his participation. . . ." Section 103(f) thus accords a right to compensation coextensive with the right to accompany. [1] The majority's bifurcation of these rights is flatly inconsistent with this statutory language.

The question is, then, how broad is the right to accompany the inspector? Helen Mining maintained during oral argument that the right to accompany does not extend to all inspections. None of my colleagues accept this reading of the statute, nor do

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[1] The only exception to this principle is of no consequence here. Section 103(f) contains an express limitation on the number of miners' representatives entitled to walkaround pay when more than one miners' representative accompanies an inspection party.

I. Like them, I do not believe that Congress intended to narrow the broad right to accompany granted by the 1969 Act. The 1969 Act's walkaround provision granted a right to accompany the inspector on all inspections. The purpose of the 1977 Act was to promote rather than weaken mine safety and health, and to encourage rather than discourage miner participation in inspections. The Senate committee that drafted the walkaround provisions of the 1977 Act stated not only that the right to accompany in the 1977 Act is "based on that in the [1969] Coal Act" (S. Rep. at 28; 1977 Legis. Hist. 616) (reproduced at 28, *infra*), but that the purpose of the 1977 Act was to establish "a *strengthened* mine safety and health program." S. Rep. at 13; 1977 Legis. Hist. at 601 (emphasis added).[2] The phrase "pursuant to the provisions of subsection (a)" should be read in light of this indisputable congressional purpose. Inasmuch as there can be no dispute that this was not intended to limit the miner's right to accompany the inspector, it cannot be read to limit the right to walkaround pay.

Other considerations buttress this reading of the Act. Even if I were to consider the language of the 1977 Act without reference to the 1969 Act, or to the expressed congressional intention to strengthen the mine safety laws, I would not construe the phrase "pursuant to the provisions of subsection (a)" as has Helen Mining. First, the phrase appears to be a simple cross-reference to the provision that describes all inspections—section 103(a)—rather than a limitation. Second, even if considered as a limitation, the inspection here is not excluded by that phrase. The Secretary argues that simply because a type of inspection is specifically treated in another provision of the Act does not mean that it is outside section 103(a). I agree. Although the spot gas inspection in this case was required to be conducted with a certain *frequency* by section 103(i), it was conducted "pursuant to the provisions of

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[2] The legislative history relied on by my colleagues confirms that no diminution of the right to accompany was intended. See 1977 Legis. Hist. at 1358, reproduced in the majority decision at 9.

subsection (a)" since its purpose was to determine "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards."

This point is best illustrated by supposing that section 103(i) did not exist at all. In that case, if the Secretary were to adopt a schedule of spot gas inspections identical to that mandated by section 103(i), there would be no question that the inspection fell within the provisions of section 103(a). Yet, because Congress decided instead to enhance miner health and safety by statutorily mandating the frequency of such inspections, the right to walkaround pay is limited. This is senseless. Not only does this result bear no relationship to the purpose for the inclusion of section 103(i), it contravenes that purpose. Section 103(i) covers not only gassy mines, which present great dangers of fires and explosions and in which ventilation and methane control are critical, but also mines in which there are "some other especially hazardous conditions." The majority has thus discouraged miner participation in inspections of those mines that are among the most dangerous to miner health and safety. Under the majority's holding, a miner who requests a special inspection pursuant to section 103(g)(1), would not be paid for participating in the inspection to, for example, personally show the inspector the condition that he or she requested be inspected, or explain why the miner believed the condition is dangerous.

My colleagues maintain that section 103 is ambiguous and does not "clearly" support the Secretary's position. I find it plain and unambiguous on its face and would therefore deem it unnecessary to look at legislative history as a guide to its meaning.[3] I do so here only because the majority relies almost entirely on a statement by Congressman Perkins *(supra)* to support its position. That some sections of the 1977 Act use the phrase "any inspection" merely reflects the different sources of

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[3] *TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978).

the statutory language,[4] rather than ambiguity. That the language of the 1969 Act was not copied precisely, and that section 103(a) refers specifically and exclusively to only regular inspections, are ambiguities only if one believes—which the majority apparently does not—that Congress intended to accord miners fewer walkaround rights under the 1977 Act than under the 1969 Act. When section 103 is read in historical context and in consonance with the entire statute, these alleged ambiguities disappear.

The authoritative portions of the legislative history of section 103(f) also support the Secretary's interpretation of the walkaround pay right. The Senate committee that drafted the walkaround pay provisions of the 1977 Act stated in its report the reasons for according the right to walkaround pay:

> *The right of miners and miners' representatives to accompany inspectors.*
>
> Section 104(e) contains a provision based on that in the [1969] Coal Act, requiring that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection. The opportunity to participate in pre- or post-inspection conferences has also been provided. Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage

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[4] Much of section 103(f), including the phrase "under subsection (a)" in the Senate bill, was derived from 29 U.S.C. § 657(e), section 8(e) of the Occupational Safety and Health Act of 1979, 29 U.S.C. § 651 *et seq*. The last sentence of section 103(a) and the first sentence of section 107(a) were derived from sections 103(b)(1) and 104(a) of the 1969 Act.

> such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties. The Committee also recognizes that in some circumstances, the miners, the operator or the inspector may benefit from the participation of more than one representative of miners in such inspection or conferences, and this section authorizes the inspector to permit additional representatives to participate.

S. Rep. at 28-29; 1977 Legis. Hist. at 616-617. The Senate report does not limit either the rights to accompany or to walkaround pay. Indeed, it states that the right to accompany is "based on that in the [1969] Coal Act," which, as noted above, extended to all inspections. It states a legislative purpose applicable to all inspections and nowhere evidences so much as a suggestion that the right to walkaround pay is not coextensive with the right to accompany.

The conference committee's report summarized the Senate bill's provisions, and declared that its purpose was "to encourage miner participation." The committee made only a technical, non-substantive change in the first sentence of section 103(f), and stated that "[t]he conference [bill] conforms to the Senate bill." Conf. Rep. at 45; 1977 Legis. Hist. at 1323. [5]

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[5] The conference report states:

> Both the Senate bill and the House amendment contained provisions permitting miners' representatives to accompany inspectors on mine inspections. The House amendment did so by adopting Section 103(h) of the Coal Act. The Senate bill permitted miners' representatives to participate not only in the actual inspection of the mine itself, but also in the pre- or post-inspection conferences held at the mine. Under the House amendment this right was limited to the actual inspection of the mine. The Senate bill required the Secretary to consult with a reasonable number of miners if there was no authorized representative of miners. The House amendment did not contain this protection for unorganized miners. The Senate bill permitted the Secretary's representative to permit more than one

These Senate and conference reports therefore provide no support for the majority position. In short, the Act makes inseparable the right of miners to accompany inspectors on walkaround and to receive pay.

The majority, however, reaches beyond the Act and even the Senate and conference reports. It seizes upon a statement made by Representative Perkins on the floor of the House and construes the Act in a manner inconsistent with both its language and purpose.

Assuming *arguendo* that Mr. Perkins' statement reflected the intent of the conference committee, it does not follow that those views are determinative here. If the views of the conference committee are presented to or are available to both Houses before they vote to accept a conference bill, such views would no doubt be of more significance than is here the case. The joint explanatory statement in the conference report, or the oral presentation by the chief conferee of each House, ordinarily provides each House with an explanation of the conferees' agreement. [6] The members of each House can therefore be informed of the reasons why the final bill has been shaped in a certain way or resembles a bill of one House. It is primarily for this reason that in the ordinary case the intention of the conferees can be safely said to be a convincing guide to the intention of the entire Congress.

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miner representative to participate in such inspection and conferences, and further, to encourage miner participation, provided that one such representative of miners, who is also an employee of the operator, be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions.

The conference substitute conforms to the Senate bill.

[6] See 2 U.S.C. § 109c(a) (Senate rule), and House Rule XXVII(1)(c), requiring that conference bills be accompanied by a joint explanatory statement that is "sufficiently detailed and explicit to inform the [House and Senate] as to the effect which the amendments or proposition contained in such report will have upon the measure to which those amendments or propositions relate." *See also*, Jefferson's Manual § 542 at 276 (1977).

This is not the ordinary case, however. The conference report did not mention the agreement later attested to by Representative Perkins; to the contrary, it conveyed the distinct impression that the broad walkaround pay right granted by the Senate bill was unchanged, for it stated that the conference bill "conforms to the Senate bill." Senator Williams, the primary architect of the Senate bill and the chief conferee for the Senate, did not mention the point during his presentation of the conference bill to the Senate. The conference bill itself could not plausibly be said to have put the Senate on notice of the conferees' agreement because the language of the conference bill unmistakably grants a right to walkaround pay which is coextensive with the right to accompany the inspector; the same is true of the Senate report and the Senate bill.

Finally, and fatal to the majority's contention, Representative Perkins' statement of the conference committee's contrary understanding was made 21 days after the Senate voted.[7] Therefore, when the Senate voted to accept the conference bill, there was no indication before the Senate, nor would the Senate have had reason to suspect, that the conference bill, the conference report and the Senate report were not reliable guides to the conference committee's agreement. The Senate could have only believed that the conference bill meant what it said. Although arguably the vote of the House may have reflected the view of the conference committee, the same cannot be said of the vote of the Senate.

It is a basic principle that the content of the law must depend upon the intent of both Houses, not of just one. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 366-368 (1976), *quoting Vaughn* v. *Rosen*, 523 F.2d 1136, 1142-1143 (D.C. Cir. 1975). *Cf.* K. Davis, Administrative Law Treatise § 3A.31 at 175 (1970 Supp. to 1st ed.). In this case, to follow the conferees'

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[7] These remarks were made on October 27, 1977; the Senate had voted to accept the Conference Report on October 6, 1977. 1977 Legis. Hist. at 1347, 1354.

interpretation would violate this principle, for the Senate cannot be said to have been aware of or suspect, let alone assent to, the conferees' interpretation. What is equally paradoxical, however, is that not to follow the conference committee's view may perhaps fail to give effect to the House's intention.

Congressional intent can best be determined, however, by looking to the stated purpose of the walkaround pay right as expressed in bills and documents that were available to *both* Houses *before* they voted, and most importantly, the language of the statute that the entire Congress passed. *Cf. Department of the Air Force* v. *Rose*, 425 U.S. at 365-367; *Jordan* v. *Department of Justice*, 591 F.2d 753, 768 (D.C. Cir. 1978) (en banc); *Vaughn* v. *Rosen*, 523 F.2d at 1142-1143; *Hawkes* v. *IRS*, 467 F.2d 787, 794, 796-797 (6th Cir. 1972); *Getman* v. *NLRB*, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971). *See also March* v. *United States*, 506 F.2d 1306, 1314 & n.33 (D.C. Cir. 1974).

The right to walkaround pay is clearly expressed in the Senate report and the conference report. Congress insisted upon miners' participation in inspections, in order that safety and health hazards be exposed, brought to the attention of the Secretary and eliminated promptly. This would also aid the inspector and result in a valuable reciprocal benefit to the miners, who would thereby learn more about health, safety and mine hazards. Assuring that miners' representatives are paid during all inspections serves these purposes. In so observing, I give weight to the Secretary's opinion that his inspectors will be aided by the miners' participation in these inspections.

Most importantly, section 103(f) is simply not susceptible to the construction urged by the operators. As noted, the language of the statute clearly makes the right to walkaround pay coextensive with the right to accompany the inspector, and it is impossible to hold that Congress intended to deny miners the right to accompany the inspector. I therefore dissent.

/s/ A. E. Lawson

A. E. Lawson, Commissioner

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

1730 K Street N.W. 6th Floor
Washington, D.C. 20006

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Docket No. PIKE 78-399

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KENTLAND-ELKHORN COAL CORPORATION,

v.

SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION (MSHA),

and

UNITED MINE WORKERS OF AMERICA

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November 30, 1979

## DECISION

The question here is whether a mine operator must pay a miners' representative for the time he spends accompanying a mine inspector during a special electrical inspection of a mine. Administrative Law Judge Lasher answered that question in the negative. We affirm.

On May 23, 1978, Vernon Hardin, an inspector from the Department of Labor's Mine Safety and Health Administration, began a specialized electrical inspection of a coal mine and preparation plant operated by Kentland-Elkhorn Coal Corporation. The purpose of the inspection, which lasted at least 21 days, was to make a "complete electrical examination of the . . . mine and preparation plant." The inspector used equipment such as voltmeters and ohmmeters for testing electrical circuits. By coincidence, the electrical inspection took place when another inspector was making a "regular inspection," i.e., one of the four inspections of an entire mine that the

third sentence of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ["the 1977 Act"] requires the Secretary to conduct every year. Judge Lasher found, and it is not disputed, that the specialized electrical inspection was not conducted as a part of the regular inspection, and that the regular inspection was conducted independently by the other inspector.

On May 23 and 24, 1978, Douglas Blackburn, a miner employed by Kentland-Elkhorn accompanied inspector Hardin during the electrical inspection as the miners' representative. Before the inspection began, Kentland-Elkhorn officials informed Hardin that Blackburn would not be paid for the time he spent accompanying Hardin. Blackburn was not paid, and on June 20, 1978, Hardin issued to Kentland-Elkhorn a citation under section 104(a) of the 1977 Act alleging a violation of section 103(f). The alleged violation was not abated by the time fixed in the citation, and, on June 23, 1978, Hardin issued a withdrawal order under section 104(b). The order, which did not require the withdrawal of miners from mining operations, was terminated 20 minutes after its issuance, after Kentland-Elkhorn officials paid Blackburn for his time.

Kentland-Elkhorn then sought Commission review of the citation and withdrawal order, and a hearing was held before Judge Lasher. Kentland-Elkhorn argued to Judge Lasher that the right to "walkaround pay" granted by section 103(f) is confined to regular inspections, and cited the language and the legislative history of section 103(f) to support its argument. The Judge concurred in this view, and vacated the citation and withdrawal order. The Secretary filed a petition for discretionary review, which we granted on April 11, 1979. On July 31, 1979, we heard oral argument in this case and in *Helen Mining Co.*, No. PITT 79-11-P, decided on November 21, 1979.

In *Helen Mining*, we decided a question similar to this one. We found that section 103(f) of the 1977 Act is ambiguous and did not clearly point to a solution to the problem raised there. We examined the portion of the legislative history upon which

Kentland-Elkhorn relies here—a statement by Representative Perkins to the House of Representatives stating the intention of the conference committee to limit the right to walkaround pay to regular inspections—and found it dispositive of the question there. We arrive at the same conclusion here. As in *Helen Mining*, the words of the statute standing alone do not clearly support the position of any party, and we believe that the intention of Congress to limit walkaround pay to regular inspections was most clearly evidenced by Mr. Perkins' statement.

Accordingly, the judge's decision is affirmed.

/s/ Jerome R. Waldie
JEROME R. WALDIE, Chairman

/s/ Richard V. Backley
RICHARD V. BACKLEY, Commissioner

/s/ Marian Pearlman Nease
MARIAN PEARLMAN NEASE, Commissioner

Commissioner Jestrab, dissenting:

I join my colleague, Commissioner Lawson, in dissenting from the majority opinion. There is no inspection described as "regular" in the 1977 Act. The statutory authority for the inspection here is section 103(a). Section 103(f) expressly requires the payment of walkaround pay. *A fortiori*, my dissent in *Helen Mining Company*, No. PITT 79-11-P, is applicable here.

/s/ Frank F. Jestrab
FRANK F. JESTRAB, Commissioner

Commissioner Lawson, dissenting:

In *Helen Mining Company*, No. PITT 79-11-P, the majority denied walkaround pay "during a 'spot' inspection required by section 103(i)" of the 1977 Act. In the present decision the majority, without determining the statutory authorization for the electrical inspection, appears to be extending its holding in

*Helen* and to deny walkaround pay for all inspections except so-called "regular inspections."

For the reasons stated in my dissent in *Helen Mining*, I find section 103(f) of the Act to be clear and unambiguous in mandating walkaround pay for all inspections made pursuant to section 103(a) without regard to their frequency. This inspection is authorized by section 103(a) and a miner accompanying the inspector is therefore entitled to walkaround pay.

I therefore dissent.

/s/ A. E. Lawson
A. E. LAWSON, Commissioner

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

1730 K Street N.W. 6th Floor
Washington, D.C. 20006

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Docket No. WEVA 79-148-D

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SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION (MSHA)

on behalf of
ARNOLD J. SPARKS, JR.

v.

ALLIED CHEMICAL CORPORATION

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December 6, 1979

**DECISION**

The decision of the administrative law judge is reversed; his order is vacated, and the complaint is dismissed. *Helen Mining Co.*, No. PITT 79-11-P (November 21, 1979). *See also Kentland-Elkhorn Coal Corp.*, No. PIKE 78-399 (November 30, 1979).

/s/ Jerome R. Waldie
JEROME R. WALDIE, Chairman

/s/ Richard V. Backley
RICHARD V. BACKLEY, Commissioner

/s/ Marian Pearlman Nease
MARIAN PEARLMAN NEASE, Commissioner

Commissioners Jestrab and Lawson, dissenting:

We dissent for the reasons stated in our dissenting opinions in *Helen Mining Co.*, No. PITT 79-11-P (November 21, 1979),

and *Kentland-Elkhorn Coal Corp.*, No. PIKE 78-399 (November 30, 1979).

/s/ Frank F. Jestrab
FRANK F. JESTRAB, Commissioner

/s/ A. E. Lawson
A. E. LAWSON, Commissioner

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
4015 Wilson BoulevardArlington, Virginia 22203

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Civil Penalty Proceeding
Docket No. PITT 79-11-P
A/O No. 36-00926-03001

Homer City Mine

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SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION (MSHA),
*Petitioner*

v.

HELEN MINING COMPANY,
*Respondent*

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April 11, 1979

**DECISION**

Appearances: Leo McGinn, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia, for Petitioner, MSHA; Todd D. Peterson, Jones, Day, Reavis and Pogue, Washington, D.C., for Respondent, Helen Mining Company.

Before: Judge Merlin

**Statement of the Case**

This case is a petition for the assessment of a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977.

MSHA alleges a violation of section 103(f), the "walkaround" provision of the Act. A hearing was held on March 20, 1979.

Both parties presented oral evidence (Tr. 9-36). At the conclusion of the taking of evidence, counsel waived the filing of written briefs, presented oral argument, and agreed to have a decision rendered from the bench (Tr. 36-80). Upon the conclusion of oral argument, a decision was rendered from the bench (Tr. 80-89).

**Bench Decision**

The bench decision is as follows:

> The issue presented in this case is whether a miner representative who accompanies an MSHA inspector during a section 103(i) "spot inspection" is entitled to be paid pursuant to the provisions of section 103(f) of the Federal Mine Safety and Health Act of 1977.
>
> The facts are undisputed. On April 6, 1978 an inspector of the Mine Safety and Health Administration made a spot inspection pursuant to section 103(i) of the Act. Section 103(i) directs, inter alia, that where a mine liberates excessive quantities of methane, it shall be inspected during every five working days.
>
> On April 6, 1978 the inspector made a 103(i) inspection and during that inspection was accompanied by a miner representative for three hours. The operator refused to pay the miner representative for the three hours, resulting in the issuance of the subject citation and order, and also resulting in the assessment of a civil penalty and filing of the instant petition.
>
> The evidence also shows that three days earlier, on April 3, 1978, this inspector had begun a "regular" inspection of the mine. Section 103(a) requires that each underground coal mine be inspected in its entirety at least four times a year. Each total inspection is of course done over a period of time, and the individual inspections which comprise the total inspection are referred to as "regular" inspections.
>
> On April 6, 1978 the inspector performed a 103(i) spot inspection for methane instead of continuing on the regular inspection which he was performing during that period. The inspector testified, however, that a regular 103(a) inspection and a 103(i) spot inspection could be

going on at the same time with two different inspectors, and that if this were so, MSHA would require that if miner representatives accompanied both inspectors, both miner representatives be paid. Accordingly, it makes no difference that in this case only the spot inspection was being performed because it is MSHA's position that all walkarounds on 103(i) spot inspections must be compensated pursuant to section 103(f). Section 103(f) provides that a miner representative shall be given the opportunity to accompany the MSHA inspector during the physical inspection of any coal or other mine made under section 103(a), and that the miner representative shall suffer no loss of pay while he so participates in the inspection.

It is the operator's position that under 103(f) it is required to pay only the miner representative who accompanies an MSHA inspector on a regular inspection, and that, therefore, it was not required to pay the miner representative in this case who accompanied the inspector on a section 103(i) spot inspection.

MSHA's position is that the operator is required to pay the miner representative who participated for three hours in the 103(i) spot inspection. As the Solicitor's oral argument makes clear, MSHA's position is predicated essentially upon the Interpretive Bulletin published by the Secretary of Labor at 43 Federal Register 17546, April 25, 1978. The Bulletin recognizes that the participation and payment provisions of section 103(f) refer to inspections made pursuant to section 103(a). However, the Bulletin refers to all the purposes enumerated in 103(a) for which inspections are made, including determinations for imminent danger and violations. Since 103(i) spot inspections are made for the purposes of finding imminent dangers or violations, the Bulletin takes the position that a spot inspection constitutes an inspection under 103(a) for purposes of the participation and payment provisions of 103(f). According to the Bulletin, the requirement of four inspections per year for each mine in its entirety as set forth in section 103(a) is only a statutory minimum and has nothing to do with the right of participation or the right to compensation. It is on this basis that MSHA contends in this case the operator must pay the miner representative who accompanied the inspector under 103(i) spot inspections.

I have carefully considered MSHA's position as explained here today at length by the Solicitor and as set forth in the Interpretive Bulletin. I am unable to accept MSHA's position. I recognize the Interpretive Bulletin represents the Secretary's position, and that it should be reviewed in light of the Secretary's responsibilities under the Act. However, the Interpretive Bulletin is not binding upon me. This was expressly decided by the United States District Court for the District of Columbia in *Bituminous Coal Operators Association, Inc.* versus *Marshall and the United Mine Workers*, Civil Action No. 78-0731, (January 11, 1979).

I must review and judge the Interpretive Bulletin in light of the language of the statute and the legislative history. The Interpretive Bulletin and the interpretation advanced by the Solicitor here today in effect, read section 103(i) back into 103(a). In addition, the Bulletin recognizes that there are other inspections such as those under 103(g) which are performed at the request of a miner. The Bulletin also reads these inspections back into subsection (a) by relying upon the purposes for which such inspections are carried out, i.e., discovering violations or imminent dangers.

The insuperable difficulty I have with this approach is that if section 103(f) covered all inspections, it could have provided for walkarounds and payments for all inspections without making any reference whatsoever to subsection (a). Reference to subsection (a) must be regarded as a limitation because it leaves out the other subsections pursuant to which inspections also are undertaken. Any other interpretation renders the reference to subsection (a) as it appears in subsection (f) meaningless. Accordingly, reading the other subsections, such as (i) and (g) back into subsection (a) in the manner of the Interpretive Bulletin in effect violates the language of the statute and the way it is written and organized. In this connection also I note that subsection (f) precedes (i) and (g). I conclude, therefore, that the reference in 103(f) to inspections under 103(a) means the regular inspections described in that section.

On this basis, I conclude the operator was not required to pay for the walkaround in this case, and that, therefore, there was no violation.

During oral argument great attention was given, both by the Solicitor and operator's counsel, to the remarks of Congressman Perkins who was the manager of the Conference Committee for the House of Representatives. When introducing the conference bill and report to which the House and Senate conferees had agreed, Congressman Perkins explained on the floor of the House the meaning of section 103(f) with respect to compensation. First, the congressman set forth all the purposes for which inspections are performed under 103(a) and that each mine must be inspected in its entirety at least four times a year. He then pointed out that in addition to the regular inspections performed under subsection (a), inspections also were performed under subsections (i) and (g). Turning then to section 103(f), Congressman Perkins gave the following explanation with respect to compensation: "Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section (g) (1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the federal inspector, including pre and post-conferences, at no loss of pay only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety, including pre and post-inspection conferences."

Congressman Perkins then compared section 103(f) of the present Act with section 103(h) of the 1969 Act, which gave the miner representatives the right to participate in "any" inspection, but which had no provision at all for compensation. The congressman then stated as follows: "Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 Act, but rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the Act."

Finally, the congressman stated: "Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator."

The congressman's statements appear at Volume 123, No. 174, Congressional Record, H-11663, Daily Edition, October 27, 1977; and in Legislative History, Committee Print (July 1978) at pages 1356 to 1358.

Immediately after Congressman Perkins' statements, the House of Representatives voted to pass the bill. I believe the congressman's remarks regarding the operator's obligation to pay for walkarounds are too clear to be ignored and do not point to any interpretation other than that the operator only has to pay for the walkarounds on the four regular inspections. As the Solicitor has persuasively stated, it may be desirable to compensate miner representatives who accompany MSHA inspectors on all inspections. This, however, is not what the Act presently says. Moreover, the congressman, who perhaps had more to do with the enactment of this legislation than any other, specifically stated the opposite. I cannot legislate and neither can the Secretary. Change must come from Congress.

One final matter: I recognize that limiting the right to compensation to regular inspections performed under subsection (a) may raise a question of whether there is a walkaround right for inspections other than regular inspections. Congressman Perkins' statement quoted above indicates that the miner representative can accompany the inspector during any inspection other than a regular inspection, exclusive of the operator's responsibility to pay. The statutory basis of the congressman's assertion of the general walkaround right for all inspections is not apparent. Be that as it may, however, the congressman's explanations limiting the operator's obligation to compensate walkarounds is so clear and the statutory language regarding the limited obligation to pay under these circumstances is so clear to me that they simply cannot be ignored. Here, again, if the walkaround right without compensation has inadvertently been limited, then the remedy lies with Congress. However, I must point out that for present purposes, this issue is not presented in this case, and I do not have to decide it. I only make the general observation that if the problem exists, it is one to be set right by legislation and not by administrative fiat. Of course, based upon the representations made to me during oral argument, it appears that as a practical matter, the problem does not exist because the walkaround

right is available during all inspections, generally, pursuant to the union contract.

In light of the foregoing, therefore, I find there was no violation.[1] MSHA's petition for the assessment of a civil penalty is hereby dismissed. I express my appreciation to both counsel for the very fine oral arguments that were made.

**ORDER**

It is hereby ORDERED that the foregoing bench decision be affirmed, that no penalty be assessed for the reason that no violation existed and that the instant petition for a penalty assessment be DISMISSED.

/s/ Paul Merlin
PAUL MERLIN
Assistant Chief Administrative Law Judge

Issued: April 11, 1979

Distribution:

Leo McGinn, Esq., Office of the Solicitor, MSHA, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Todd D. Peterson, Esq., Jones, Day, Reavis & Pogue, 1100 Connecticut Avenue, NW, Washington, DC 20036 (Certified Mail)

Administrator, Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

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[1] Administrative Law Judge Michael A. Lasher, Jr., interpreted section 103(f) in a similar manner in two recent decisions. *Kentland-Elkhorn Coal Corporation* v. *Secretary of Labor and United Mine Workers* (PIKE 78-399) and *Magma Copper Company* v. *Secretary of Labor and United Steel Workers* (DENV 78-533-M), dated March 8, 1979.

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
4015 Wilson BoulevardArlington, Virginia 22203

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Application for Review

Docket No. PIKE 78-399

Feds Creek No. 1 Mine

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KENTLAND-ELKHORN COAL CORPORATION,
*Applicant*

v.

SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION (MSHA),

and

UNITED WORKERS OF AMERICA,
*Respondents*

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March 8, 1979

**DECISION**

Appearances: C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, for Applicant;
Leo J. McGinn, Esq., Office of the Solicitor, Department of Labor, for Respondent.

Before: Administrative Law Judge Lasher

**I. Statement of the Case**

Applicant seeks review of Order No. 063798, dated June 23, 1978, which was issued by MSHA inspector Vernon E. Hardin. The order was issued pursuant to section 104(b) of the Federal

Mine Safety and Health Act of 1977[1] citing Applicant with failing to abate a previously issued citation within the time required. The citation which was issued by Inspector Hardin on June 20, 1978, cited Applicant for refusing to pay employee Douglas Blackburn, the representative of the miners, for his participation in an electrical inspection at Applicant's preparation plant on May 23 and May 24, 1978.[2]

The Application for Review which initiated this proceeding was timely filed on June 28, 1978. Applicant contends that both the citation and order, each of which charge violations of sec-

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[1] 30 U.S.C. § 801 *et seq.*

[2] The citation charged a violation of section 103(f) of the Act which provides:

"(f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

tion 103(f) of the Act, are invalid and seeks to have them vacated. [3]

A hearing was held in Princeton, West Virginia, on December 7, 1978, at which both parties were represented by counsel. [4] Inspector Hardin testified for MSHA and Roger Bartley, Applicant's safety director, testified for the Applicant.

**II. Discussion and Findings of Fact**

Applicant contends that it was not in violation of section 103(f) of the Act, since, on May 23 and 24, 1978, it did pay one of two miners' representatives present for participation in an inspection. The facts are not in substantial dispute. According to Inspector Hardin, two separate inspections were being conducted on the dates in question: the one he was conducting was a specialized electrical inspection which was not part of a regular inspection of the mine which was being conducted independently by a second MSHA inspector, Aaron Hall. The record amply reveals that these inspectors did not travel together, did not coordinate their inspections, and were functioning separately on the dates in question. According to Inspector Hardin, his electrical inspection was one which is required to be conducted once annually by the MSHA manual, whereas the inspection conducted by Inspector Hall was one of at least four regular inspections required to be conducted annually by the Secretary of every mine in its entirety by

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[3] In paragraph 7 of the application, Applicant alleges that on May 23 and 24, 1978, two MSHA inspectors were present at the Feds Creek No. 1 Mine and preparation plant; that each inspector was accompanied on his inspection by a representative of the miners; and that one of these representatives suffered no loss of pay as a result of his participation in the inspection.

[4] The United Mine Workers of America, upon motion of applicant, was dropped as a party by my order entered on the record at the hearing since the UMWA had not responded to my prehearing order and had made no appearance at the hearing.

section 103(a) of the Act. The report of his inspection filed by Inspector Hardin (Court Exh. 1) indicates that it was a coal mine safety and health electrical CBA inspection (Tr. 42). The electrical inspection was not part of the regular inspection of the entire mine conducted by Inspector Hall. The evidence clearly indicates, and I conclude, that these were two separate inspections (Tr. 16-18, 35-42, 48-53).

Inspector Hall was accompanied by Kenneth Smith, a slate picker, who was paid for his participation in Inspector Hall's regular "entire mine" inspection, which would have taken approximately 1 month to complete. Respondent admits that it refused to pay another employee, Douglas Blackburn, for his participation in the 2-day electrical inspection conducted by Inspector Hardin both at the time the citation was issued and again when the order of withdrawal was issued. [5]

Applicant's argument at the hearing that replacing Blackburn and Smith with less experienced miners might have an adverse affect on safety has been considered. However, it has no direct relevance in determining the primary legal issue involved in this proceeding and that is whether Applicant was required to pay Blackburn for the time he expended in participating in the inspection conducted by Inspector Hardin so that Blackburn would "suffer no loss of pay during the period of such participation" as required by the Act. Since Inspector Hardin's inspection was a separate inspection from Inspector Hall's, it would ordinarily be concluded at this point that both the citation and order were properly issued and that the relief sought by the application should be denied. [6]

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[5] Applicant did pay Blackburn after the order of withdrawal was issued and the order was then terminated by Inspector Hardin at 8:50 a.m. on June 23, 1978.

[6] This is a case of first impression. I have held in another matter, *MSHA* v. *Magma Copper Company*, Docket No. DENV 78-533-M, issued simultaneously herewith, that the right of a miner representative/employee to participate in an inspection without loss of pay granted by section 103(f) of the Act is expressly limited to one representative per inspection—not per inspector.

Applicant, however, in its brief raised for the first time a purely legal issue which I find dispositive of this case. Applicant contends that the provisions of section 103(f) of the Act granting miner representatives the right to participate in an inspection with pay is limited to the regular "entire mine" inspections conducted pursuant to section 103(a) of the Act.[7] There is no question but that the first sentence of section 103(f) is a general section against which the remaining sentences must be read and it does expressly limit the types of inspections in which the operator's and miners' representatives have a participation right to those "made pursuant to the provisions of subsection (a)." On the face of it, this is a restriction—why else include the quoted language at all? Moreover, Congress' intent to limit walkaround rights under 103(f) is further demonstrated by its elimination of such rights for "any inspection" as previously provided in section 103(h) of the 1969 Act.

What is the extent of this limitation? Applicant places great emphasis, and I believe properly so, on the remarks of Con-

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[7] More specifically, in its posthearing brief at page 15, Applicant makes the following contention:

"B. Order No. 063798 was improperly issued because section 103(f) of the Act provides miner representatives the right to participate in inspections at no loss of pay only where the inspection is conducted pursuant to section 103(a) of the Act. Inspector Hardin's electrical inspection was not conducted pursuant to section 103(a).

The plain language and legislative history of section 103(f) of the Act establish that the right to participate in inspections at no loss of pay exists only for a limited type of inspection. Specifically, section 103(f) limits walkaround rights with no loss of pay to "physical inspection[s] of any coal or other mine made pursuant to the provisions of subsecton (a)" of section 103 of the Act. Section 103(a) provides for at least four annual "inspections of each underground coal or other mine in its entirety." These four annual inspections of an entire mine are identified in the MSHA Citation and Order Manual (A-1) by the code of letters AAA, and are distinguished therein from all other types of inspections."

gressman Perkins, Manager of the Committee of Conference for the House of Representatives, in his report to the House. They follow.

Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.

Section 103(a) of the conference report provides that authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this act. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this act, and his experience under this act and other health and safety laws.

*In carrying out the requirements of clauses (3) and (4)—concerning imminent dangers or compliance with standards—the Secretary shall make inspections of each* underground coal or other *mine in its entirety at least four times a year* and of each surface coal or other mine in its entirety at least two times a year.

*In addition to the regular inspections of each mine in its entirety as specified in section 103(a),* section 103(g)(1) provides that whenever a representative of a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further, section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.

Section 103(f) provides that a miner's representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section 103(g)(1) or 103(i), *the intention of the conference committee is to assure* that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-conferences, at *no loss of pay only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety*, including pre- and post-inspection conferences.

The original section 103(a) of the Federal Coal Mine Health and Safety Act of 1969 provided that—

In carrying out the requirements of clauses (3) and (4) of this subsection in each underground mine, such representatives shall make inspections of the entire mine at least four times a year.

Section 103(a) of the 1969 Act did not include the new provisions—

The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to the act, and his experience under this act and other health and safety laws.

Section 103(h) of the 1969 act provided generally that—

At the commencement of any inspection * * * the authorized representative of the miners at the mine * * * shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay *only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act.* Beyond these requirements regarding

no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator." Vol. 123, No. 174, Cong. Rec. H 11,663 (daily ed. October 27, 1977); Legislative History, Committee Print (July, 1978), 1347, 1356-1358. [Emphasis supplied.]

It could, of course, be argued that the Act is not ambiguous and that Congressman Perkins' remarks should be ignored since reference to the legislative history is not warranted. Pursuing this approach, the points of argument would seem to be that:

1. Section 103(a)[8] does not say "four entire mine inspections will be conducted annually."

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[8] Section 103(a) provides:

"Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary,

2. It does say—expressly in its first sentence—that the Secretary shall make frequent inspections (entire mine or otherwise) for various purposes and—expressly in the third sentence—that *at least* four entire mine inspections annually will be made for the purpose of determining if imminent danger or violations exist.

3. The 103(f) limitation to inspections made pursuant to "the provisions (plural) of subsection (a)" cannot simply ignore the first sentence of 103(a) and confine itself to the third sentence.

I am unable to adopt the above rationale for the reason that Congress, by tacking on to its grant of accompaniment rights the phrase "* * * during the physical inspection * * * made pursuant to * * * subsection (a)" must have had something in mind other than blanket coverage of all inspections. This phrase becomes a meaningless appendage if—via confinement to the general opening sentence of section 103(a)—it is construed to cover all inspections. The only specific kind of inspection mentioned in 103(a) is the regular inspection mandated in the third sentence thereof. As categories of inspection go, the regular is the most important kind—of an entire mine, conducted at least quarterly, for the purpose of finding violations and seeking out imminent dangers.

The widely-quoted admonition of Justice Murphy in *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 87 L.Ed. 407, 65 S. Ct. 361 (1943), is particularly applicable here. After first noting that the court below had refused to examine the legislative history of section 807 of the Revenue Act of 1932 on the ground

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or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

that it was unambiguous, Justice Murphy made this observation:

> But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination. * * * So, accepting the Circuit Court's interpretation of Illinois law as to the incidence of the tax, we think it should have considered the legislative history of § 807 to determine in just what sense Congress used the words 'payable out of.'

Similarly, the purpose to be achieved here is to secure that construction of the Act which gives effect to the Congressional purpose. For this reason, considerable weight must be given the statement of Congressman Perkins. At the outset of his remarks, he noted that indeed there was an "ambiguity." His statement—made on behalf of the Committee, not just himself—reveals that the ambiguity referred to is precisely that with which we are dealing. In explaining the ambiguity, he pointed his remarks directly to the legal question under discussion, the meaning of the phrase "physical inspection * * * made pursuant to the provisions of subsection (a)." This is not the situation which occurs so frequently when reference to the legislative history is sought—where we are asked to draw inferences from some indiscriminately dropped word or phrase uttered by a speaker focused on an issue extraneous to the one under discussion. It is a relevant, unequivocal statement by the Conference Committee of Congressional intent made at the most significant stage of the legislative process. It cannot be ignored.[9]

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[9] See also *Cass* v. *U.S.*, 417 U.S. 72, 40 L.Ed.2d 668, 94 S. Ct. 2167 (1974), where the Court again declined to "ignore the clearly relevant" legislative history of a problem Act. I am aware that the Respondent's Interpretative Bulletin, 43 F.R. 17546, April 25, 1978, at page 17547, directly contradicts the Conference Committee's indication of the types of inspections covered. The Bulletin covers all inspections mentioned in both the first and third sentences of section 103(a), while the Committee intended that only the regular inspections mandated by the third be covered. While an agency in-

I conclude that the clearly expressed intent of Congress is to require accompaniment with no loss of pay only for the so-called regular entire mine inspections mandated by subsection 103(a). Relying thereon, I also find that the section 103(f) phrase "physical inspection * * * made pursuant to the provisions of subsection (a) * * *" "refers to the inspections expressly referred to in the third sentence of section 103(a) of the Act, that is, the regular inspections which the Secretary, in carrying out his responsibility to determine either if an imminent danger exists or if there is compliance, must conduct of a mine in its entirety at least four times a year.

In the instant case, a miner representative/employee was permitted accompaniment on the regular inspection of the entire mine conducted by Inspector Hall on May 23 and 24, 1978, without loss of pay. I conclude that accompaniment by a miner representative/employee without loss of pay on Inspector Hardin's electrical inspection on the same 2 days was not required by section 103(f) of the Act. There is merit in the application.

## ORDER

All proposed findings of fact and conclusions of law submitted by the parties not expressly incorporated in this decision are rejected.

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terpretation is usually entitled to great weight, in this instance the Respondent appears to have leapt the chasm between what the law is and what it ought to be. In my decision in *MSHA* v. *Magma Copper Company, supra*, I noted that the Bulletin is to be distinguished from regulations promulgated in compliance with the Administrative Procedure Act. In divining the Congressional intent underlying section 103(f) in the specific respect involved here, I believe the only objective approach is to accept the clearly relevant interpretative aid of the legislative history rather than the construction urged by the enforcement agency. Congress has anticipated the question posed in this proceeding and answered it.

The relief sought in the application herein is GRANTED. Order No. 063798 dated June 23, 1978, and Citation No. 063792 dated June 20, 1978, are VACATED.

/s/ Michael A. Lasher, Jr.
MICHAEL A. LASHER, JR., Judge

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FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
4015 Wilson BoulevardArlington, Virginia 22203

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Application for Review of Discrimination

Docket No. WEVA 79-148-D

Shannon Branch Coal Mine

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SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION (MSHA),

On behalf of:

ARNOLD J. SPARKS, JR.,

*Applicant*

v.

ALLIED CHEMICAL CORPORATION,

*Respondent*

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September 27, 1979

**DECISION AND ORDER**

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Marshall C. Spradling, Esq., Spilman, Thomas, Battle & Klostermeyer, Charleston, West Virginia, for Respondent.

Before: Judge Kennedy

This is a discrimination complaint brought pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act, *as amended*, 30 U.S.C. § 815(c)(2), on behalf of Arnold J. Sparks,

Jr., a miner employed at Allied Chemical Corporation's Shannon Branch Coal Mine.

On March 28, 1978, MSHA inspector Cloy Blankenship performed a "spot" ventilation inspection of respondent's mine pursuant to section 103(i) of the Act. Before making his inspection, the inspector informed William P. Lusk, an assistant mine foreman, that Arnold J. Sparks, Jr., was going to accompany him on the inspection as a representative of the miners. Mr. Lusk told Mr. Sparks that he would not be paid by Allied for his participation in the inspection. Mr. Sparks did participate in the inspection, and Allied refused to pay him for that participation. [1]

On May 23, 1979, the Secretary of Labor filed this complaint alleging respondent interfered with the exercise of the statutory rights of Mr. Sparks as a representative of the miners in violation of section 105(c)(1) of the Act. Applicant prays that Allied be ordered to cease and desist from refusing to pay representatives of miners for participating in inspections; that Allied be ordered to pay Mr. Sparks for his participation in the inspection on March 28, 1978, with interest at 9 percent; and that Allied be assessed an appropriate civil penalty for its interference with the exercise of rights protected by section 105(c) of the Act. On August 30, 1979, respondent filed a motion for summary decision and brief in support thereof pursuant to 29 CFR 2700.64 on the grounds that the statutory language, legislative history and case law interpreting the relevant sections of the Act demonstrate that as a matter of law Allied is not required to pay Mr. Sparks for his participation in a "spot" inspection made pursuant to section 103(i) of the Act. On September 10, 1979, the Secretary filed his opposition along with supporting briefs. There being no genuine issue as

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[1] These are the material facts as disclosed in applicant's complaint and in respondent's motion for summary disposition. Paragraphs 4 and 5 of the complaint allege that the inspection at issue was a "spot" inspection. The Secretary neither admits nor denies that the inspection was made pursuant to section 103(i).

to the material facts, the matter stands ready for summary decision of the question of statutory construction presented.

At issue in this litigation is the extent of miners' walkaround rights, *i.e.*, the right to accompany an inspector and to receive normal compensation while doing so. This right is recognized in section 103(f), 30 U.S.C. § 813(f), of the Act, which provides that a representative of the miners shall be given an opportunity to accompany an inspector for the purpose of aiding in the "inspection of any coal or other mine made pursuant to [section 103(a)]."[2] Any such representative of the miners who is also an employee of the operator "shall suffer no loss of pay during the period of his participation in the inspection." Respondent contends that there are certain types of inspections to which the right to compensation does not attach, in particular, spot in-

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[2] Section 103(f), 30 U.S.C. § 813(f), of the Act provides:

"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with the subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

spections for extrahazardous conditions pursuant to the mandate of section 103(i)

The scope of the Secretary's mine inspection authority is delimited by section 103(a),[3] which directs "frequent" inspection of all mines for four purposes: (1) to obtain information relating to health and safety conditions and the causes of accidents; (2) to gather information relating to mandatory standards; (3) to determine whether imminent dangers exist; and, (4) to determine compliance with mandatory standards, citations, orders, or decisions. With respect to imminent dangers and compliance, the Secretary is directed to inspect each mine "in its entirety at least" four times per year for underground mines and two times per year for surface mines. In

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[3] Section 103(a), 30 U.S.C. § 813(a), of the Act reads in pertinent part:

"Authorized representatives of the Secretary or the Secretary of Health Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws."

addition to this minimum requirement for complete inspections, the Secretary is directed to establish guidelines for additional inspections based on his experience under the Mine Act "and other health and safety laws."

Thus, it is apparent that the substantive authority for carrying out inspections for the purposes of obtaining information and insuring compliance is to be found in section 103(a). The regular compliance inspections are to be carried out frequently, but, in no event less than two or four times yearly.

In addition to the minimum requirements for compliance inspections, two other subsections establish special procedures for triggering inspections for compliance and information. Section 103(g)(1)[4] provides that at the request of a representative of the miners who has reasonable grounds to believe that a violation or imminent danger exists an immediate special inspection may be had. Section 103(i)[5] provides for

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[4] Section 103(g)(1), 30 U.S.C. § 813(g)(1), of the Act reads in pertinent part:

"Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

[5] Section 103(i), 30 U.S.C. § 813(i), of the Act reads:

"Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, 'liberation of excessive quantities of methane or other explosive gases' shall mean liberation of more than one million cubic feet of methane or other explosive

"spot" inspections for methane accumulations in gassy mines and for "other especially hazardous conditions" on an accelerated schedule.

Respondent takes the position that the compensation right under section 103(f) extends only to the minimum of four mandatory inspections "of the mine in its entirety," and that any other or additional inspections are without the coverage of the section. Maintaining that these "regular" inspections are the "only inspections made pursuant to Section 103(a)" (Brief, p. 5), respondent asserts that only a representative of miners participating in such a "regular" inspection is entitled to be paid. Respondent claims that since the inspection giving rise to the instant complaint was made pursuant to section 103(i), and since "there is no requirement in Section 103(i) that the operator pay a representative of miners for participation in such a spot inspection" *(id.)*, the miner Sparks is not entitled to compensation.

The Secretary, on the other hand, takes the position that the language of the compensation provision of section 103(f) clearly and unambiguously encompasses all inspections carried out for the purposes enumerated in the four clauses of the first sentence of section 103(a). Relying on the Interpretative Bulletin of April 25, 1978, 43 F.R. 17546, the Secretary maintains that the "inclusion of a statutory minimum number of inspections at each mine is no more than an additional requirement, clearly

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gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals."

directed at the Secretary, which does not affect the participation right." 43 F.R. at 17547. Therefore, the Secretary concludes that because they are carried out for the purpose of obtaining information or determining whether imminent dangers, violations or especially hazardous conditions exist, the inspections triggered by sections 103(i) and (g)(1) "are clearly conducted 'pursuant to' section 103(a)." *Id.*

In support of its position, respondent cites two previous decisions by administrative law judges which concluded that operators are not required to pay employees who accompany MSHA inspectors on other than the "regular," *i.e.*, entire mine inspections. *Kentland-Elkhorn Coal Corporation* v. *Secretary of Labor*, PIKE 78-339 (March 8, 1979), *appeal pending; Secretary of Labor* v. *Helen Mining Company*, PITT 79-11-P (April 11, 1979), *appeal pending.*

In *Kentland-Elkhorn*, an MSHA electrical specialist conducted an inspection of the operator's preparation plant. At the time of this inspection, another inspector was in the process of carrying out one of the "regular" inspections of the mine in its entirety. That inspector was accompanied by a miner who was paid. The electrical specialist was also accompanied by a representative of the miners, and upon the operator's refusal to pay that miner, a citation and subsequently a withdrawal order issued. In a review proceeding, the operator contended that section 103(f) only grants miner representatives the right to participate in an inspection without suffering loss of pay during a "regular" inspection of the entire mine and since the inspection at issue was a spot electrical inspection, it had properly refused to pay the miner. The administrative law judge agreed with these contentions and held that the right to participate without loss of pay is limited to "regular" inspections of the entire mine.

A similar conclusion was reached in *Helen Mining Company, supra*, with respect to a spot inspection required by section 103(i). Since the mine involved in that case was particularly gassy, it had to be frequently inspected for possible accumulations of methane. The inspector involved had been in

the process of making one of the "regular" inspections of the mine in its entirety during the previous 3 days, but he interrupted this inspection so that he could investigate areas where accumulations of methane might exist in order to determine whether those areas were adequately ventilated. The inspector was informed that the representative of the miners who accompanied him on the methane inspection would not be paid, whereupon a citation and subsequently a withdrawal order issued. At the hearing, the operator contended that section 103(f) only requires that the miner representative who participates in an inspection of the entire mine must be paid. [6] Again, the administrative law judge agreed with these contentions and vacated the citation and order.

Both these cases turned on the authority ascribed to certain remarks made by Congressman Perkins, Chairman of the Committee on Education and Labor. These remarks were made after the Conference Committee had made its final report and 21 days after the Senate had passed the bill. [7] In

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[6] The operator's argument proves too much, because if accepted it would lead to the conclusion that the miner initially requested must accompany the inspector during the whole of the entire mine inspection. Recognizing that in many cases such complete inspections take a considerable amount of time, even weeks or months, it is unrealistic to assume that one particular miner would be assigned to accompany the inspector exclusively, especially considering that no one miner possesses the expertise to assist the inspector in investigating all the areas of a large and complex mine.

[7] The Conference Committee voted to accept the Conference Report on October 3, 1977 (*Leg. Hist.* at 1279), the Senate voted to accept the Conference Report on October 6, 1977 (*Leg. Hist.* at 1347), and a Concurrent Resolution to effect corrections was agreed to on October 17, 1979 (*Leg. Hist.* at 1351). It was not until October 27, 1977, that Congressman Perkins made his remarks to the House. (*Leg. Hist.* at 1354). There is no evidence that Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate.

attempting to clarify what he considered to be an ambiguity in this aspect of the Conference Report, he stated that:

> Section 103(f) provides that a miner's representative * * * shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not those pursuant to section 103(g)(1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the federal inspector, including pre- and post-conferences, at no loss of pay only during the four regular inspections of each underground mine in its entirety * * *.

Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess (July 1978) at 1357 (hereinafter cited as *Leg. Hist.*)

This seemingly unequivocal statement concerning the intended scope of section 103(f) was, however, followed by a comparison of the cognate provisions of the 1969 Act which indicates some possible confusion on Congressman Perkins' part. He recognized that section 103(a) of the 1969 Act did not include the provision directing the Secretary to "develop guidelines for *additional inspections* of mines based on criteria including, but not limited to, * * * his experience under this act and other health and safety laws." (Emphasis added.) He then correctly pointed out that the participation right section of the 1969 Act, section 103(h), provided that a representative of the miners may accompany an inspector on "any" inspection, but that the 1969 Act did not have a compensation provision. He then went on to state:

> Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 act, but rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not

> for the *additional inspections* otherwise required or permitted by the Act. [Emphasis added.]

*Leg. Hist.* at 1358.

Thus, a fair reading of the whole of Congressman Perkins' statement concerning the seeming ambiguity found in section 103(f) indicates that his real concern was that the right to pay for exercise of the walkaround right not be extended to the "additional inspections" permitted under the new section 103(a), but would be limited to the "frequent inspections" authorized and required by the first sentence of that section. Thus, it appears that when Congress limited the right to pay to inspections "pursuant to subsection (a)," it may have intended to exclude from that right inspections made under guidelines issued by the Secretary calling for "additional inspections," *i.e.*, inspections other than those mandated by the statute. In other words, there are two categories of inspections, statutory section 103(a) inspections and nonstatutory Secretarial inspections. Congress may well have wished to protect the operators from an unlimited expansion of the right to pay based on "additional inspections" authorized only by the Secretary and particularly where they were for the purpose of aiding in the exercise of his responsibilities under "other health and safety laws."

Indeed, the greater weight of the legislative history supports this interpretation. First, it should be noted that the provision at issue was included in the Senate version of the bill and the Joint Explanatory Statement of the Conference Committee clearly indicates that "to encourage miner participation * * * one such representative of miners, who is also an employee of the operator, [shall] be paid by the operator for his participation in the inspection and conferences. The House amendment did not contain these provisions. The conference substitute conforms to the Senate bill." *Leg. Hist.* at 1323. It is significant to note that nowhere in the Conference Committee statement is the purported limitation on the compensation right advanced by Congressman Perkins discussed or alluded to.

In the Senate's consideration of the 1977 Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits, one of the managers of the bill, explained the critical importance of the walkaround right as part of a comprehensive scheme to improve both safety and productivity in the mines:

> First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.
>
> In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.
>
> In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property go around with an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

*Leg. Hist.* at 1054-1055.

Senator Williams, Chairman of the Committee on Human Resources, also discussed the importance of the walkaround right in the context of improving safety consciousness on the part of both miners and management:

> It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties.

*Leg. Hist.* at 616-617.

In light of the broad policy in the Act of protecting miners and making inspections more effective, it is difficult to understand why the isolated remarks of Congressman Perkins have been accorded so much weight. In contrast, similar remarks by other members of the House and Senate are conspicuous by their absence. It would seem that if Congress had intended by section 103(f) to create two separate categories of statutory walkaround rights, one compensable and one non-compensable, there would have been at least some debate on this departure from the general scheme of the Act. Otherwise, there exists an arguably invidious discrimination.

In any event, it is questionable whether resort to legislative history has a place in the application of the statutory language in question. *T.V.A.* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). On its face, section 103(f) if clear and unambiguous, and therefore reliance on the explanatory comments of a single Congressman appears unnecessary. *Schiaffo* v. *Helstoski*, 492 F.2d 413, 428 (3rd Cir. 1974).

It is has been consistently held that as a matter of statutory construction it is error to place undue emphasis on a portion of the legislative history where to do so sacrifices the object of the legislation. "Not even formal reports—much less the language of a member of a committee—can be resorted to for the purposes of construing a statute contrary to its plain terms." *Committee for Humane Legislation* v. *Richardson*, 414 F. Supp. 297, 308 (D.D.C. 1976), *modified* 540 F.2d 1141 (D.C. Cir. 1976); *citing Pennsylvania Railroad Company* v. *International Coal Mine Company*, 230 U.S. 184, 199 (1912); *F.T.C.* v. *Manager, Retail Credit Company*, 515 F.2d 988, 995 (D.C. Cir. 1975). It must be remembered that the proper function of legislative history is to resolve ambiguity, not to create it. *United States* v. *Missouri Pacific Railroad Company*, 278 U.S. 269, 278 (1929); *Montgomery Charter Service* v. *W.M.A.T.A.*, 325 F.2d 230, 233 (D.C. Cir. 1963); *Elm City Broadcasting Corporation* v. *United States*, 235 F.2d 811, 816 (D.C. Cir. 1956).

It should be noted that these sections of the Mine Safety Act serve a broad remedial purpose, and as such should be given a liberal construction, and any asserted exceptions to those provisions should be given a strict, narrow interpretation. *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F.2d 772, 782 (D.C. Cir. 1974), *cert. denied*, 430 U.S. 938 (1975). Finally, when a statutory interpretation that promotes safety conflicts with one that serves another purpose, the first must be preferred. *District 6, UMWA* v. *IBMA*, 562 F.2d 1260, 1265 (D.C. Cir. 1977).

Accordingly, whether based on an analysis of the relevant legislative history or through applicaton of accepted canons of statutory construction, I find that the reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of that subsection, and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of that subsection.

**Conclusions Of Law**

1. Section 105(c)(1), the discrimination provision of the Act, which prohibits any form of interference with the exercise of the statutory rights of a miner or representative of miners is a proper vehicle for review of an operator's refusal to compensate a representative of miners pursuant to section 103(f).

2. The reference in section 103(f) to inspections "made pursuant to subsection (a)" includes all inspections made for the purposes enumerated in the four clauses of the first sentence of section 103(a), irrespective of whether the particular inspection may have been triggered by section 103(i), and is not limited to the minimum number of inspections of the mine in its entirety mandated by the third sentence of section 103(a).

3. Since the inspection at issue in this proceeding was made for the purpose of "obtaining information relating to health and safety conditions" including "especially hazardous" conditions authorized by both sections 103(a) and (i) of the Act, Mr. Sparks' participation was compensable under section 103(f).

4. Taking into consideration the six criteria for the assessment of civil monetary penalties, I find that a penalty for violation of section 103(f) of $100 is consistent with the purposes and policy of the Act.

**ORDER**

WHEREFORE, IT IS ORDERED that:

1. Respondent CEASE AND DESIST from refusing to pay representatives of miners for participating in inspections made for the purposes of obtaining information relating to extrahazardous conditions under section 103(i) of the Act.

2. On or before Wednesday, October 31, 1979, respondent shall pay the civil penalty assessed in the amount of $100.

3. On or before Wednesday, October 31, 1979, respondent shall pay to applicant, Arnold J. Sparks, Jr., back pay based on his regular hourly rate for the period of time involved in the inspection of March 28, 1978, with retroactive interest thereon

of 9 percent (9%) from March 28, 1978, until the date of payment.

4. Counsel for the parties shall stipulate the dollar amount due under paragraph 3 of this order. If they are unable to stipulate such amounts within 15 days of this order, counsel may file herein proposed amounts due and, if necessary, a hearing shall be held on any issues relating to such proposals.

5. Within 10 days of payment of the amount due under paragraph 3 of this order, counsel for Applicant shall file herein a Satisfaction of Order reciting the amount paid.

6. Respondent shall, within 15 days of the date of this order, post a copy of this decision and order on a bulletin board at the Shannon Branch Coal Mine, where notices to miners are normally placed, and shall keep it posted there, unobstructed and protected from the weather, for a consecutive period of 60 days.

Finally, it is ORDERED that, subject to the satisfaction of the above, this matter be, and hereby is, DISMISSED.

/s/ Joseph B. Kennedy
JOSEPH B. KENNEDY
Administrative Law Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**September Term, 1981**

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**No. 79-2503**

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UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION, *Respondent*

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**No. 79-2518**

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION, *Respondent*

HELEN MINING COMPANY AND
KENTLAND-ELKHORN COAL CORPORATION, *Intervenors*

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**No. 79-2536**

RAY MARSHALL, SECRETARY OF LABOR, *Petitioner*

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION, *Respondent*

KENTLAND-ELKHORN COAL CORPORATION, *Intervenor*

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**No. 79-2537**

RAY MARSHALL, SECRETARY OF LABOR, *Petitioner*

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION, *Respondent*

HELEN MINING COMPANY, *Intervenor*

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No. 80-1021

RAY MARSHALL, SECRETARY OF LABOR, *Petitioner*

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, *Respondent*

UNITED MINE WORKERS OF AMERICA AND ALLIED CHEMICAL CORPORATION, *Intervenors*

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**United States Court of Appeals**
**for the District of Columbia Circuit**

**FILED FEB 23 1982**

**GEORGE A. FISHER**
**Clerk**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1981

No. 79-2503, et al.

PETITIONS FOR REVIEW OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BEFORE: Tamm and Wald, Circuit Judges, and Harold H. Greene,* United States District Judge for the District of Columbia

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Federal Mine Safety and Health Review Commission, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the orders of the Commission are reversed, and the cases are remanded for further proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 23, 1982
Opinion for the Court filed by District Judge Greene.
Concurring opinion filed by Circuit Judge Wald.
Dissenting opinion filed by Circuit Judge Tamm.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 79-2503

UNITED MINE WORKERS OF AMERICA,
*Petitioner*

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,
*Respondent*

ARGUED 1-12-81

BEFORE: Tamm and Wald, Circuit Judges and Harold Greene*, Judge, United States District Court for the District of Columbia

ORDER

On consideration of the petition for rehearing of intervenor-respondents The Helen Mining Company and Kentland-Elkhorn Coal Corporation, filed March 19, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

*Per Curiam*

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 9 1982

GEORGE A. FISHER
Clerk

FOR THE COURT:

George A. Fisher,
Clerk

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 79-2503

UNITED MINE WORKERS OF AMERICA
v.
FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION,
*Respondent*

ARGUED 1-12-81

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

ORDER

The suggestion for rehearing en banc of intervenor-respondents The Helen Mining Company and Kentland-Elkhorn Coal Corporation has been circulated to the full court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

*Per Curiam*

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 9 1982

GEORGE A. FISHER
Clerk

FOR THE COURT:
George A. Fisher, Clerk

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Tamm, Robb and Bork would grant the suggestion for rehearing *en banc*.

## 30 U.S.C. § 813(f)

**(f) Participation of representatives of operators and miners in inspections**

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

## 30 U.S.C. § 813(a)

### § 813. Inspections, investigations, and recordkeeping

#### (a) Purposes; advance notice; frequency; guidelines; right of access

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right of entry to, upon, or through any coal or other mine.

## 30 U.S.C. § 813(i)

(i) Spot inspections

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION
4015 Wilson BoulevardArlington, Virginia 22203

November 17, 1978

MEMORANDUM FOR: DISTRICT MANAGERS, Coal Mine Health and Safety
HERSCHEL H. POTTER
JOSEPH A. LAMONICA

FROM: JOSEPH O. COOK
Administrator for
Coal Mine Safety and Health

SUBJECT: Policies with Respect to Inspections

The policies listed below become effective upon receipt of this memorandum and supersede all previous instructions on this subject.

## *I. Inspections*

| *Title* | *Frequency* |
|---|---|
| Underground mines and their surface facilities | Four times a year |
| Surface mines including auger mines and their surface facilities | Two times a year |
| Underground mines that come under the requirements of Section 103(i) | Once each 5, 10 or 15 days |
| Shafts and slopes | Twelve times a year[1] [2] [3] |
| Major construction sites | Twelve times a year[1] [2] [3] |
| Culm banks and reclaim refuse piles | Two times a year |

[1] These entities are only required to be inspected two times a year; however, because of the accident/injury frequency rates at those operations or the potential for serious accidents, they are to receive a regular inspection each month.

| *Title* | *Frequency* |
|---|---|
| Dredges | Two times a year |
| Loading docks | Two times a year |
| Centrally located preparation plants | Two times a year |
| Centrally located shops | Two times a year |
| Other surface entities | Two times a year |

Culm banks, refuse piles and impoundments that are undergoing major construction activities, such as installation of spillways, decant systems, underdrains, foundation preparation and other critical phases of work affecting the integrity and overall stability of the site are to be considered major construction sites. Such sites are to be inspected a minimum of 12 times a year. Refuse disposal sites that have been upgraded to an acceptable factor of safety (at least 1.5 to 1), can pass or store the design storm, and are placing and compacting daily refuse production from a coal preparation plant need only be inspected a minimum of two or four times a year, whichever is applicable. Special reclamation work, such as the extinguishment of a fire area within a refuse pile or impoundment, should also be classified as a major construction site and be inspected a minimum of 12 times a year so as to ensure that the firefighting activities are being conducted in a safe manner and in accordance with an approved firefighting plan.

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[2] These entities are to be inspected separately and a separate report prepared even though they may be located at an active surface or underground mine.

[3] See a memorandum dated April 24, 1978, subject, "Regular Inspections of Shafts, Slopes, and Major Construction Sites," and a memorandum dated July 13, 1978, subject, "Shafts, Slopes, and Major Construction Sites/Inspections and MIS Recording," on coding additional inspections in the Management Information System.

Each underground mine is required to be inspected in its entirety four times a year and each surface mine in its entirety two times a year. These inspections should be scheduled so that each underground mine is inspected once each quarter and each surface mine once each six months.

A regular inspection of a surface or underground mine, once started, shall be a continuous inspection until the mine is inspected in its entirety. For the mine or facility to be inspected in its entirety, the health aspects of the inspection also shall be completed. This includes noise measurement surveys at each of these entities. In addition, full shift respirable dust sampling shall be conducted during the one regular inspection at a surface mine or facility that is made during the summer months or "dry period" of the year. Underground sampling for respirable dust plan evaluations under Section 75.316 is a mandatory requirement each six months and these sampling instructions shall continue to be made and recorded under MIS code "BAB." Further, during each regular underground inspection, respirable dust plans shall be evaluated by visual observation and measurement of engineering parameters as set forth in the approved respirable dust plan.

*II. Resident Inspection Program*

The "resident inspection" program is based on the following two factors:

*Factor A.* Mines liberating one million or more cubic feet of methane in a 24-hour period

In those mines that (1) liberate one million cubic feet of methane in 24 hours or have had a gas ignition or explosion which resulted in death or serious injury during the past five years, and, (2) have an incident rate (degrees 1 through 5) greater than the national average, and, (3) scored less than 800 points (80 percent) on their mine profile (Mine Profile Rating System) shall have a full-time inspector assigned to the mine.

"Full time" as used in Section II of this memorandum means that an inspector will be assigned responsibility for one mine. The inspector will be responsible for conducting the required number of regular inspections and Section 103(i) inspections. This does not mean that a full 40 hours each week must be physically at the mine assigned to the inspector; however, it does mean that except for inspection preparation time, report writing, staff meetings and similar duties needed to support an inspection, the inspector is to be at the mine. When the inspector will be absent more than four days to attend training, court appearances, leave, etc., a substitute inspector shall be assigned to the mine.

Whenever the inspector begins a regular inspection, he shall notify the operator and the representative(s) of the miners. The inspection shall be continuous, except when conducting a section 103(i) inspection, until the entire mine has been inspected at which time the operator shall be informed that the inspection is finished. The inspector assigned to the mine will conduct a section 103(i) inspection every five working days at irregular intervals.

In determining the methane liberation, the following factors shall be used:

1. Methane liberation for 24 hours shall be based on an average of the four most recent inspections in which air samples were collected to determine total liberation of methane for the mine except when the last inspection indicates that the mine liberates a million or more cubic feet of methane in 24 hours. Following an inspection in which air samples are collected, a new average will be made.

2. The average shall be based on air samples collected near the point where the return air is exhausted from the mine.

3. Methane liberated from boreholes shall not be used in determining the average.

*Factor B.* Mines that are of such size that an inspection of the entire mine requires the assignment of an inspector for a period of 50 days or more during a quarter

Inspectors assigned full time to these mines shall be rotated every six months. The mine status shall be reevaluated at the end of each calendar year.

*III. Section 103(i) Inspections*

Mines that come under the provisions of section 103(i), other than those mines discussed in Section II of this memorandum, shall be inspected every 5, 10 or 15 days. This inspection shall not constitute a part of any other category of inspection. These inspections should be keyed to those problems, hazards or conditions that resulted in the mine being classified as a section 103(i) mine. The method of determining methane liberation at a mine shall be based on the procedures described in Section II of this memorandum.

*IV. Hazard Analysis Accident Prevention Program*

This program has been discontinued. This concept will be incorporated into all inspections and is being taught as part of the Systems Safety Engineering course at the National Academy.

*V. Inspections Made Under the Provisions of Section 103(g)*

Section 103(g)(1) of the Federal Mine Safety and Health Act of 1977 states, in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

Any such notification shall be reduced to writing and signed by the complainant.

If it is determined that a special inspection is not warranted, a written notice of such finding shall be issued as soon as possible to the representative of miners or miner and a copy shall be served upon the operator. When the Secretary or his representative conducts a special inspection in accordance with this section and finds a violation or imminent danger, a citation or withdrawal order, as appropriate, shall be issued. Upon completion of a section 103(g) inspection in which the subject of the complaint was found not to exist, written notification shall be provided to the representative of the miners and the operator before the inspector leaves the mine premises. Such notification shall be written in longhand on a continuation Form 7000-3a. See Figure 1.

If violations are observed that do not specifically relate to the complaint, they shall be included in a separate safety and health spot inspection report.

Section 103(g)(2) of the Act states, in part:

> Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine.

Upon receiving such notification, the inspector will determine whether or not any action is required or if an investigation of the allegation is warranted. In evaluating the complaint, the inspector should consider the following factors:

1. The information provided
2. The inspector's knowledge of the mine areas where the condition or practice is alleged to exist
3. The basis of the complaint

Any written notification of an alleged violation or imminent danger received by an inspector from any miner at a mine shall receive the consideration and attention as that of such notification from a representative of miners. The inspector shall provide the complainant an oral explanation of what action was taken or finding made. The inspector shall retain, for the record, the written notice of the alleged violation or imminent danger and also provide detailed notes of the action taken. Such notes shall describe the reason for the action taken and the context of any oral explanation given the complainant. Any inspection made shall be recorded as part of the on-going inspection and not as a section 103(g) inspection.

Section 43.7 of 30 CFR sets forth procedures for an informal review when an inspector refuses to issue citations upon notification of an alleged violation or imminent danger in accordance with section 103(g) of the Act.

Form 7000-3 is being revised in that the term "significant and substantial" has been abbreviated as "S AND S" and a new box has been added identifying citations issued because of a written notification of an alleged violation or an imminent danger. The term "written notification" shall be abbreviated as "WN." The type of inspection will not be changed as a result of a section 103(g)(2) request; however, citations issued as a result of such request shall be identified by checking the WN box.

Until the citation Form 7000-3 has been revised and distributed, the inspector shall identify any citation or order issued as a result of a written notification by a representative of miners or a miner by providing a box and the phrase "Written Notification" on the existing Form 7000-3 as shown in Figure 2.

*VI. Impact Inspections*

The policy of conducting impact inspections as discussed in the June 21, 1976, Staff Meeting remains in effect.

*VII. Ventilation Impact Inspections*

Ventilation impact inspections will continue to be conducted in accordance with instructions set forth in a memorandum dated August 4, 1977, subject, "Impact Inspections of Mines Liberating Methane;" however, some Districts are using ventilation impact inspections to meet the requirement that all underground mines be inspected at least four times a year. As we understand, a ventilation impact inspection is conducted and an inspector(s) finishes the inspection. The use of ventilation inspections is, in most cases, focused on a single segment of an inspection and does not address the broad phases; therefore, the policy of Coal Mine Safety and Health shall be that ventilation impact inspections will not be used towards satisfying the requirement of four regular health and safety inspections at an underground mine.

*VIII. Inspection of Abandoned or Inactive Surface and Underground Mines Before Mining Operations Commence*

When a mine has been abandoned or declared inactive by the operator, an inspection of the entire mine shall be made before mining operations are resumed.

The inspector shall determine the operator's name, the mine name and the previous mine identification number of the mine. He shall also determine if any citations or imminent danger withdrawal orders are outstanding on the mine and the status of such citations or orders.

The inspector shall determine whether the provisions of Section 75.1721 or Section 77.1712 of 30 CFR have been complied with in full.

If the inspector determines that a condition in the mine presents an imminent danger, he shall issue an order under section 107(a) of the Act. The inspector shall issue citations, under section 104(a) or 104(d), as appropriate, for violations of any mandatory health or safety standard. In addition, the

citation shall fix a reasonable time for the abatement of the violation. After the inspection, the inspector shall meet with the operator or his agent to discuss the citations.

Form 2000-22, cover sheet for inspection reports, shall be identified as Coal Mine "Reopening" Inspection Report. The inspector's statement accompanying any citation or order of withdrawal issued during the course of a reopening inspection should reflect that his inspection was made prior to the reopening of a mine.

*IX. ATF Inspections—Inspections of Explosives and Blasting Storage Facilities*

An agreement between the Department of the Treasury and the Department of Labor provides that MSHA (Metal and Nonmetal Mine Safety and Health and Coal Mine Safety and Health activities) will make inspections of storage facilities involving applications for licenses and permits under Chapter 40, Title 18 U.S.C. when the applicant is one who comes under the jurisdiction of MSHA. MSHA inspectors will also conduct compliance investigations in regard to storage and recordkeeping requirements of licenses and permittees under their jurisdiction as well as compliance investigations in regards to storage requirements of all operators under their jurisdiction as well as compliance investigations in regards to storage requirements of all operators under their jurisdiction who use and store explosives materials. MSHA inspectors will conduct compliance inspections during regular inspections.

*X. Inspection of Contractors on Mine Property*

Pending issuance of regulations to identify independent contractors, the instructions contained in memorandums dated June 3 and June 17, 1975, subjects, "Contractors Associated with the Coal Mining Industry" and "Violation Citations Issued to Contractors," respectively, remain in effect.

This memorandum supersedes the March 6, 1978, memorandum on this subject.

cc: American Mining Congress
Association of Bituminous Contractors
Bituminous Coal Operators' Association
Independent Miners and Associates
National Coal Association
National Independent Coal Operator's Association
United Mine Workers of America

UNITED STATES DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION
MSHA FORM 7000-3a (3-78)

ID# _____-__ DATED __/__/__
MO DA YR

☐ SUBSEQUENT ACTION ☐ CONTINUATION ☐ CITATION ☐ ORDER DATE 07/18/78 TIME 1010
MO DA YR (24 HR CLOCK)

SERVED TO I. M. Safety OPERATOR West Fork Coal Company

MINE Black Kode No. 6 MINE I.D. 01-00762-___ (CONTRACTOR)

JUSTIFICATION FOR ACTION CHECKED BELOW

Purpose-- This inspection was conducted to investigate a 7/18/78 complaint by a representative of the miners at this mine alleging that dangerous accumulations of loose coal, coal dust and float coal dust have accumulated throughout the 2 south belt entry.

Findings - The entire 2 south belt entry was examined and accumulations of loose coal, coal dust or float coal dust were not found.

☐ EXTENDED TO: DATE __/__/__ TIME _____ (24 HR CLOCK) ☐ VACATED DATE __/__/__ TIME _____ (24 HR CLOCK)
MO DA YR MO DA YR

☐ TERMINATED ☐ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION 103(g) SIGNATURE ▶ Joe Doe 1510 AM

Figure 1

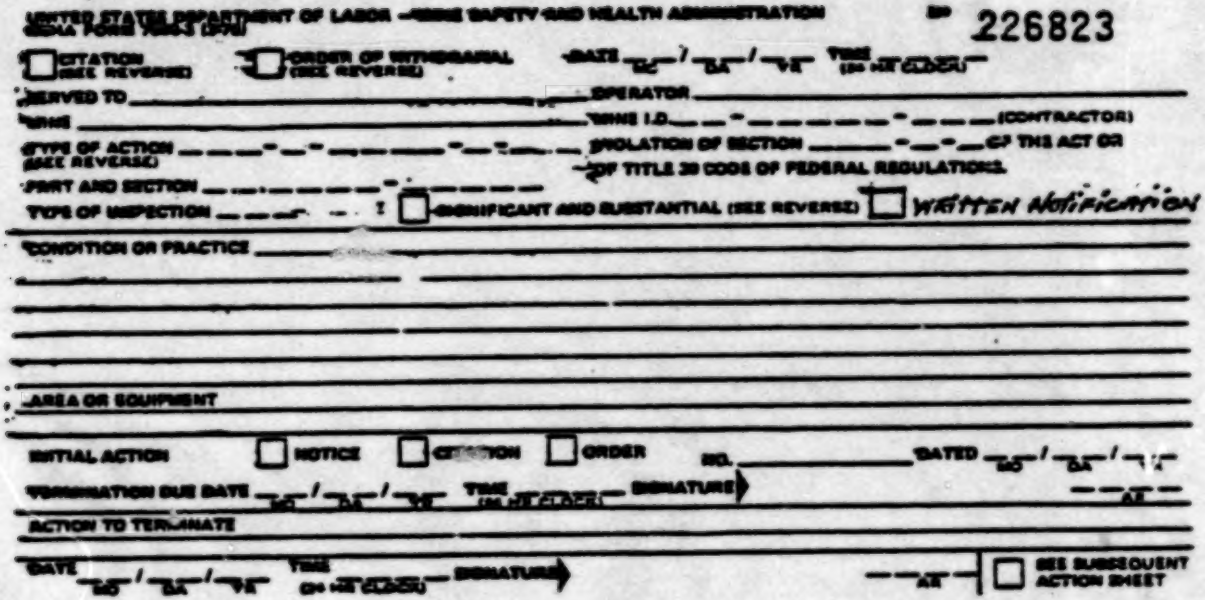
226823
CITATION (SEE REVERSE)
ORDER OF WITHDRAWAL (SEE REVERSE)
DATE
TIME
SERVED TO
OPERATOR
MINE
MINE I.D.
(CONTRACTOR)
TYPE OF ACTION (SEE REVERSE)
VIOLATION OF SECTION
OF THIS ACT OR
OF TITLE 30 CODE OF FEDERAL REGULATIONS.
PART AND SECTION
TYPE OF INSPECTION
SIGNIFICANT AND SUBSTANTIAL (SEE REVERSE)
WRITTEN NOTIFICATION
CONDITION OR PRACTICE
AREA OR EQUIPMENT
INITIAL ACTION
NOTICE
CESSATION
ORDER
NO.
DATED
TERMINATION DUE DATE
TIME
SIGNATURE
ACTION TO TERMINATE
DATE
TIME
SIGNATURE
SEE SUBSEQUENT ACTION SHEET

Figure 2

In Reply Refer To:
EMS-CMH&S

December 23, 1977

Memorandum

To: District Managers, Coal Mine Health and Safety
Chief, Division of Health
Chief, Division of Safety
Administrative Officer

From: Assistant Administrator—Coal Mine Health and Safety

Subject: Codes for the Management Information System

Enclosed is a revision of the subject codes which are to be used on and after January 1, 1978. This arrangement of the codes groups mandatory inspections and investigations, policy inspections and investigations, and auxiliary inspections and investigations. In this revision, we are using triple alpha codes. This represents a change in our present codes; however, it does not change the concept. There will be training scheduled for the coding clerks and others in early January.

Beginning January 1, 1978, prepare a set of books to track inspections and investigations that are made of entities other than coal mines, that is, entities we inspect but which do not actually produce coal from its natural deposits. Each District will then maintain three sets of books as follows:

A. Book for inspections/investigations of underground mines and the surface work areas of underground mines

B. Book for inspections/investigations of surface mines including auger mines

C. Book for inspections/investigations of:

1. Construction sites
2. Shafts and slopes
3. Culm banks and reclaim refuse piles
4. Dredges
5. Loading docks

6. Centrally located preparation plants
7. Centrally located shops
8. Other

Joseph O. Cook
JOSEPH O. COOK

Enclosure

December 21, 1977

## MIS ACTIVITY CODES—DESCRIPTION

### I. *Mandatory Inspections and Investigations*

| *Title* | *Descriptions* |
|---|---|
| *Safety & Health Inspections of an entire mine, surface facility,* or other entity with a separate I.D. number. | |
| AAA—Safety & Health Inspection | Regular inspection of entire mine. This inspection shall cover the entire underground mine and its surface facilities and at a surface mine it includes the entire surface mine and its surface facilities. |
| AAB—Safety & Health (Saturation) Inspection | Regular inspection conducted by a team of inspectors. If a saturation inspection is part of or results in a regular inspection, it shall be reported under this code. |
| *Safety & Health 103(i) Spot Inspection* of any area of a mine, surface facility or other entity. | |
| ABA—103(i) Spot (Ignition or Explosion) Inspection | Spot inspection at a mine classified as having had an ignition or explosion which resulted in death or serious injury within the past five years. |

| *Title* | *Descriptions* |
|---|---|
| ABB—103(i) Spot (Hazard) Inspection | Spot inspection at a mine where there exists other especially hazardous conditions. |
| ABC—103(i) Spot (5-day) Inspection | Spot inspection at a mine which liberates more than one million cubic feet of methane or other explosive gases during a 24-hour period. |
| ABD—103(i) Spot (10-day) Inspection | Spot inspection at a mine which liberates more than 500,000 but less than one million one cubic feet of methane or other explosive gases during a 24-hour period. |
| ABE—103(i) Spot (15-day) Inspection | Spot inspection of a mine which liberates more than 200,000 but less than 500,001 cubic feet of methane or other explosive gases in a 24-hour period. |
| *Safety & Health (Reopening) Inspection* | |
| ACA—Reopening Inspection | Inspection of an entire mine when reopened after having been abandoned or declared inactive. |
| *103(g) Spot Inspections* | |
| ADA—103(g)(1) Spot Inspection | Spot inspection resulting from a written complaint from a representative of miners or a miner. |
| ADB—103(g)(1) Spot UMWA Inspection | Spot inspection resulting from a written complaint involving a safety or health dispute under National Bituminous Coal Wage Agreement or Anthracite Wage Agreement. |

| *Title* | *Descriptions* |
|---|---|
| ADC—103(g)(2) Spot Inspection | To be developed by the Secretary at a later date. |
| *Safety & Health Technical Investigations* | |
| AEA—Toxic Substance or Harmful Physical Agent Investigation | Investigation of a reported problem or potential problem with any toxic substance or harmful physical agent. |
| AEB—Section 101(c) Petition Investigation | Investigation pertaining to a request for modification of a mandatory safety standard. |
| AEC—Section 101(d) Petition Investigation | Investigation of activities pertaining to a person who may be adversely affected by a mandatory health or safety standard promulgated under this section. |
| *Safety & Health (Accident) Investigations* | |
| AFA—Fatal Accident Investigation | Investigation of a fatal accident |
| AFB—Nonfatal Injury Accident | Investigation of an accident where a nonfatal injury occurred. |
| AFC—Non Injury Accident Investigation | Investigation of an accident where no injury occurred. |
| *Safety & Health (Special Investigator) Investigations* | |
| AGA—Special Investigator Investigation | Investigation by a Special Investigator or his alternative who accompanies accident investigation teams. |
| AGB—Special Investigator Willful Violation Investigation | Investigation of citations and orders where there is willful intent. |

| *Title* | *Descriptions* |
|---|---|
| AGC—Special Investigator Discrimination Investigation | Investigation of a discrimination complaint submitted to MSHA. |

II. *Policy Inspections and Investigations*

| *Title* | *Description* |
|---|---|
| *Safety & Health (MSHA) Policy Inspections* | |
| BAA—Ventilation (Saturation) Inspections | Simultaneous inspection of all or parts of a mine by a team of ventilation specialists and/or regular inspection personnel. Record the area of areas inspected under item V on form 2000-22. |
| BAB—Respirable Dust Technical Inspection | Inspection of an *underground* mine where full-shift samples are collected to evaluate the dust control plan. Record the area or areas inspected under item V on form 2000-22. |
| BAC—Shaft, Slope, or Major Construction Spot Inspection | Spot inspection made of shaft, slope or major construction sites to determine whether an imminent danger exists and whether there is compliance with safety and health standards or any citations or order issued. |
| BAD—Code-A-Phone Spot Inspection | Spot inspection resulting from a code-a-phone complaint. |
| *Safety & Health (MSHA) Policy Investigations* | |
| BBA—Electrical Investigation | An investigation concerning an in-depth study of any electrical components and/or systems. Includes field changes on elec- |

| *Title* | *Descriptions* |
|---|---|
| | trical face equipment, electrical activities prior to opening a new mine or the reopening of an inactive or abandoned mine, trolley surveys, circuit breaker studies, ground monitor checks, and other special electrical investigations. |
| BBB—Noise Technical Investigation | Investigation concerning the operator's noise program. Includes all supplemental noise level surveys. |
| BBC—Other Special Investigator Investigation | Investigation made when requested, that is not related to any violation or active case. |
| BBD—Mine Profile Investigation | A mine audit under the profile rating system guidelines. |
| BBE—ATF Technical Investigation | Investigation made for manufacturers dealers, or user permits or license; any special investigation made for ATF compliance or problems where it is suspected that explosives are involved. Routine inspections of explosive facilities shall not be included under this title. |

III. *Auxiliary Inspections and Investigations—(Activities supportive to mandatory and policy requirements.)*

| *Title* | *Description* |
|---|---|
| *Safety and Health Spot Inspections* | |
| CAA—Spot Inspection | Spot inspection at a mine to determine whether an imminent danger exists, and whether there is compliance with safety and health standard or with any citation or order issued. |

| *Title* | *Descriptions* |
|---|---|
| CAB—Saturation Spot Inspection | Spot inspection conducted by a team of inspectors of an area(s) at a problem mine, or other-mine. So designated by the District or Sub-District Manager. |
| ***Safety & Health Electrical Inspections*** | |
| CBA—Electrical Inspection | An electrical inspection of an entire mine. |
| CBB—Electrical Saturation Inspection | Inspection conducted by a team of inspectors of area(s) of a mine. |
| CBC—Electrical Spot Inspection | Spot inspection of a mine's electrical system. |
| ***Safety & Health Technical Inspections*** | |
| CCA—Roof Control Technical Inspection | Inspection of roof conditions for plan evaluation and compliance conducted by a specialist. |
| CCB—Haulage Technical Inspection | Inspection of a haulage system. A haulage inspection which is part of a regular inspection shall not be reported under this code. |
| CCC—Ventilation Technical Inspection | Air quality surveys which are not a detailed engineering study of a mine ventilation system and inspections for ventilation plan evaluations and compliance are reported under this code. |
| CCD—Noise Technical Inspection | Inspection for noise plan evaluation. Noise complaints and supplemental noise level surveys shall not be reported under this code but should be reported under the technical *investigation* title (Code BBB). |

| *Title* | *Descriptions* |
|---|---|
| CCE—Water Sediment or Slurry Impoundment Technical Inspection | Inspection of impoundments made by a specialist. An impoundment inspected as part of a regular inspection shall not be reported under this code. |
| CCF—Waste Pile Technical Inspection | Inspection of a waste pile made by a specialist. A waste pile inspected as part of a regular inspection shall not be reported under this code. |
| *Safety & Health Hazards Analysis Accident Prevention Inspections* | |
| CDA—HAAP Inspection | Routine inspection made by HAAP inspectors. |
| Safety & Health Technical Investigations | |
| CEA—Roof Control Technical Investigation | Engineering or in-depth study of a roof problem or potential roof problem in a mine. Includes roof control surveys, pull tests, etc. |
| CEB—Haulage Technical Investigation | Investigation of haulage activities. Includes haulage activities such as surveys and investigations for clearance waivers, etc. |
| CEC—Ventilation Technical Investigation | Detailed engineering study of ventilation problems or potential ventilation problems. Includes ventilation surveys, investigations for waiver requests etc. |
| CED—Respirable Dust Technical Inspection | Investigation concerning the operator sampling program where samples may or may not be collected. Includes investigations of 230(b) miners. |

| *Title* | *Descriptions* |
|---|---|
| CEE—Free Silica Technical Investigation | Investigation where additional respirable dust samples are collected for a free silica analysis. |
| CEF—Other Technical Investigation | Investigations not classified above. |
| *Safety & Health Other Activities* | |
| CFA—Mine Idle | Inspector attempting to make an inspection and finds mine idle. |
| CFB—ADP Contact | Mine visits involving the Automatic Data Processing System and the mine operator's respirable dust sampling program. |
| CFC—Other Contacts | Includes technical assistance visits for plan evaluations and other contacts not classified by one of the codes in this schedule. These are office visits not mine inspections or investigations. |

# UNITED STATES DEPARTMENT OF LABOR
# MINE SAFETY AND HEALTH ADMINISTRATION

## INTERIM MINE INSPECTION AND INVESTIGATION MANUAL

**March 9, 1978**

# MINE INSPECTION AND INVESTIGATION MANUAL
# FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

Public Law 91-173

As Amended by Public Law 95-164

Titles I and V Apply to All Mines

Titles II, III and IV Apply to Coal Mines Only

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Chapter VIII

COAL REFUSE INSPECTION

## D. CONDUCTING INSPECTIONS AND INVESTIGATIONS

1. *Regular Inspection.* A regular inspection is an inspection of a mine in its entirety and shall be made at least four times each year at underground mines and at least twice each year at each surface mine to determine:

(a) if an imminent danger exists, and

(b) if there is compliance with mandatory health or safety standards or with any citation, order or decision issued, or other requirements of the Act.

2. *Special Inspection.* The following procedures apply to requests (complaints), pursuant to Section 103(g)(1) when a written complaint is received at a MSHA enforcement office, or pursuant to Section 103(g)(2) when a written complaint is given to the inspector prior to or during an inspection.

(a) To meet the requirements of Section 103(g)(1) and (g)(2) of the Act, a complaint must:

(1) be reduced to writing;

(2) allege that a violation of the Act or mandatory health and safety standards or an imminent danger exists at the mine and sets forth with reasonable particularity the location and basis upon which such violation or imminent danger exists. This does not mean that the complaint must specify a particular standard;

(3) be signed by the representative(s) of the miners or by a miner where there is no such representative.

(b) The following additional information is requested:

(1) identify the name and address of the mine; and

(2) provide an address for reply (include telephone number, if any).

(c) For purposes of submitting a complaint:

(1) A "miner" would normally be an employee of the operator whose mine is being complained about. However, in some circumstances it may be a former employee; for example, where the miner may have been discharged for a complaint about unsafe or unhealthful conditions at the mine. Complaints filed by a person who alleges to have been discharged should be deemed valid and promptly investigated, and such complaints may also constitute a basis for a discrimination charge. Further, a miner may file a complaint as to the condition(s) while working near that mine.

(2) A representative of miners may be any person or organization which represents one or more miners at a mine as outlined in proposed 30 CFR Part 40.

(d) Procedures for processing complaints

(1) Complaints shall be evaluated to determine whether there are reasonable grounds to believe that a violation or imminent danger exists. In most cases, the submission of a properly completed complaint should be sufficient for evaluation purposes. If necessary, the complainant should be called or contacted to obtain details of the alleged violation or imminent danger. If the complainant is contacted, he should not be told when the inspection will take place, if at all.

(2) If it is determined that an inspection is not warranted because there are not reasonable grounds for believing that a violation or imminent danger exists, the Sub-district Manager (Assistant District Manager) shall notify the complainant in writing by certified mail of that determination. The complainant should at the same time be notified of his right to informal review by the District Mana-

ger of such determination and the procedure for obtaining such review, pursuant to Section 103(g)(2) of the Act.

(3) If it is determined that there are reasonable grounds to believe that the violation or imminent danger exists, a special inspection shall be scheduled as soon as possible. When there are reasonable grounds to believe that an imminent danger exists, the operator or his agent shall be notified of the alleged imminent danger by the fastest available means.

(4) At the time of the inspection, a copy of a 103(g)(1) complaint shall be given to the operator or his agent. The complainant's name and the names of individual miners referred to therein shall be deleted from the copy provided the operator. If a complaint is handwritten, it shall be typed or rewritten so that identity of the complainant cannot be discerned by the operator. The inspector is not required to give a copy of a 103(g)(1) complaint to the operator.

(5) Generally, the inspection should cover only violations and imminent dangers alleged in the complaint. If the inspector has reason to believe that a violation or imminent danger exists in areas of a mine other than those areas alleged in the complaint, he shall broaden the inspection to include such areas.

(6) If unusual delays are met in issuing a citation or an order pursuant to a 103(g)(1) inspection, the representative of the miners, or a miner where there is no representative, shall be notified in writing of such delays.

(7) If, after an inspection based on a complaint, it is determined that a citation is not warranted, the

supervisory inspector shall notify the complainant in writing by certified mail of such determination. At the same time, the complainant shall be notified of his right of informal review by the District Manager and the procedure for obtaining such review, pursuant to section 103(g)(2) of the Act.

(8) Written replies regarding complaints shall be sent only to the address specified by the complainant. If citations or orders are issued, copies shall be sent to the complainant.

(e) Procedures for refusal to issue citations for alleged violations. These procedures are forthcoming.

3. *Spot Inspection—Section 103(i).* The Secretary shall provide Section 103(i) inspections at the following intervals for specific conditions:

(a) Every five working days, at irregular intervals, in mines:

(1) liberating more than one million cubic feet of methane or other explosive gas in a 24-hour period; or

(2) where a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years; or

(3) when some other especially hazardous conditions exist.

(b) Every ten working days, at irregular intervals, in mines liberating more than 500,000 and up to one million cubic feet of methane or other explosive gas in a 24-hour period.

(c) Every fifteen working days, at irregular intervals, in mines liberating more than 200,000 and up to 500,000 cubic feet of methane or other explosive gas in a 24-hour period.

4. *Spot Inspection—General.* Spot inspections are conducted for a variety of purposes. They include but are not limited to the following:

(a) to determine the status of citations, notice and orders issued during a previous inspection;

(b) to collect additional samples;

(c) to monitor potentially hazardous conditions.

5. *Treasury (ATF) Inspections.* ATF inspections are to be made on a regular basis. All ATF inspections are to be recorded and reported. ATF Form 5030.5 shall be submitted to the appropriate office for each inspection. If violations are not observed, a statement so stating shall be made on the form. A copy of ATF Form 5030.5 is appended at the end of this section.

6. *Second- and Third-Shift Inspections.* The inspector shall make sufficient inspections in multishift operations to determine that safe conditions exist and that proper work procedures and practices are applied on all shifts.

7. *Inspection of Mines on Idle Shifts.* Inspections of mines or mills on idle shifts shall be limited to places where conditions are practically the same as they would be on working shifts. Escapeways, travelways, explosives and material storage areas would not be significantly different and could be inspected on idle shifts. At underground mines, shaft inspections could be arranged for during this time. All other areas of the operation where conditions, procedures, practices, or methods of operation, could affect the health or safety of the worker shall not be inspected during these down periods.

8. *Accident Investigation.* Accidents to be investigated are covered in Chapter V. All citations and orders issued during an accident investigation that contributed to the cause of the accident shall be included in the accident report. Other citations and orders issued at the time but not pertinent to the cause of the accident shall be included in a separate inspection report.

9. *Post-Inspection Conference.* Inspectors shall conduct a conference after the completion of an inspection. Representatives of the operator and the miners shall be given the opportunity to participate in the conference. Joint conferences are to be encouraged, but the inspector should hold separate post-inspection conferences when requested by either management or labor. All actions taken, which are to be included in the report, should be discussed at the conference(s).

## PETITIONERS' LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES

Pursuant to Supreme Court Rule 28.1, the following is a list of the parents, subsidiaries and affiliates of The Helen Mining Company and Kentland-Elkhorn Coal Corporation, respectively.

The Helen Mining Company is a subsidiary of North American Coal Corporation, whose other subsidiaries and affiliates are as follows:

1. The Coteau Properties Company;
2. The Falkirk Mining Company;
3. The Florence Mining Company;
4. Quarto Mining Company;
5. The Nacco Mining Company;
6. North American Consultants, Inc.;
7. The Sabine Mining Company;
8. The Western Plains Mining Company;
9. The Missouri Valley Properties Company; and
10. Apex Sales Company.

Kentland-Elkhorn Coal Corporation is a Kentucky corporation and is wholly-owned by Clinchfield Coal Company, a Virginia corporation. Clinchfield has nine other wholly-owned subsidiaries:

1. Amigo Smokeless Coal Company;
2. Badger Coal Company;
3. Buffalo Mining Company;
4. Eastern Coal Corporation;
5. Elkay Mining Company;
6. Evergreen Industries, Inc.;
7. Jewell Ridge Coal Corporation;
8. Ranger Fuel Corporation; and
9. Sewell Coal Company.

The Clinchfield Coal Company is, in turn, a wholly-owned subsidiary of The Pittston Coal Company, a Virginia and Dela-

ware corporation. The Pittston Coal Company has six other wholly-owned subsidiaries in addition to Clinchfield, which might be considered affiliates of Kentland-Elkhorn:

1. Brinks, Inc.;
2. Burlington Northern Air Freight, Inc.;
3. Pittston Coal Export Corporation;
4. Pittston Coal Sales Corporation;
5. Pittston Petroleum, Inc.; and
6. Pittston Resources, Inc.

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No. 82-33

# In the Supreme Court of the United States

OCTOBER TERM, 1982

THE HELEN MINING COMPANY AND KENTLAND-ELKHORN COAL CORPORATION, PETITIONERS

*v.*

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. IV) 813(f), entitles a miners' representative to accompany federal mine inspectors, without suffering loss of pay, on both "spot" inspections and "regular" inspections conducted under the Act.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 671 F. 2d 615. The opinions of the Federal Mine Safety and Health Review Commission (Pet. App. 47a-80a, 81a-84a, 85a-86a) are reported at 1 F.M.S.H.R.C. 1796, 1 F.M.S.H.R.C. 1833, and 1 F.M.S.H.R.C. 1947. The decisions of the administrative law judges (Pet. App. 87a-93a, 107a-121a, 95a-106a) are reported at 1 F.M.S.H.R.C. 219, 1 F.M.S.H.R.C. 1451, and Dec. F.M.S.H.R.C. 89.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 123a-125a) was entered on February 23, 1982. A petition for rehearing (Pet. App. 127a) was denied on April 9, 1982. The petition for a writ of certiorari was filed on July 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. IV) 813(f), provides for "walkaround" rights for representatives of the miners. These rights include "an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of [Section 103(a)]." Section 103(a) states that the Secretary of Labor "shall make frequent inspections" of underground and surface mines each year for certain specified purposes, including (1) to determine whether an imminent danger exists and (2) to determine whether there is compliance with mandatory health and safety standards or any citation or order issued under the Act (30 U.S.C. (Supp. IV) 813(a)).[1] The provision also sets a minimum number of inspections for these two purposes: "the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year." 30 U.S.C. (Supp. IV) 813(a). See *Donovan* v. *Dewey*, 452 U.S. 594, 596 (1981). Examinations of entire mines are commonly referred to as "regular" inspections; all other inspections under the Act are referred to as "spot" inspections (Pet. App. 6a n.4). Spot inspections are conducted for a number of specific purposes, some of which are expressly authorized by statutory provisions in addition to Section 103(a).

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[1]Section 103(a) also authorizes representatives of the Secretaries of Labor and Health and Human Services to make inspections for the purposes of obtaining, utilizing and disseminating information relating to health and safety standards and gathering information with respect to mandatory health and safety standards. The Section 103(f) "walkaround" provision refers, however, only to the Secretary of Labor's inspections. Thus, only the Secretary of Labor's inspections to assess imminent danger and compliance with the Act are at issue in this case.

In a published bulletin, the Secretary has interpreted Section 103(f) as allowing miners' representatives to participate without loss of pay in "spot" inspections as well as "regular" inspections. The bulletin reasons that both types of inspections are conducted to assess imminent danger and compliance with the Act and therefore are made "pursuant to" Section 103(a). See 43 Fed. Reg. 17546, 17547-17549 (1978).

2.a. On Apr. 3, 1978, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) conducted a spot inspection to check for methane gas at an underground mine operated by petitioner, Helen Mining Company, as specifically authorized by Section 103(i) of the Act, 30 U.S.C. (Supp. IV) 813(i) (Pet. App. 47a-48a). A miners' representative accompanied the inspector for three of the five hours of the inspection (*id.* at 48a). Petitioner Helen Mining Company refused, however, to compensate the miners' representative for the three hours (*ibid.*). The inspector then issued a citation under Section 104(a) of the Act, 30 U.S.C. (Supp. IV) 814(a), alleging a violation of Section 103(f) (Pet. App. 48a). Petitioner contested the citation and order of the Secretary, and the case was referred to an administrative law judge (ALJ) of the Federal Mine Safety and Health Review Commission (*id.* at 48a-49a). See 30 U.S.C. (Supp. IV) 815(d). The ALJ dismissed the citation and order, holding that Section 103(f) requires operators to compensate a miners' representative only when he accompanies the inspector on a regular inspection (Pet. App. 87a-93a).

b. On May 23 and 24, 1978, a MSHA inspector conducted a "spot" electrical inspection at a coal preparation plant operated by petitioner Kentland-Elkhorn Coal Corporation (Pet. App. 96a). The inspector was accompanied by a miners' representative on both days (*id.* at 98a). When petitioner Kentland-Elkhorn Coal Corporation refused to

compensate the employee for the time spent with the inspector, the Secretary alleged a violation of Section 103(f) (Pet. App. 98a). Petitioner Kentland-Elkhorn applied for review by the Commission and the application was considered, after a hearing, by an administrative law judge. The ALJ held that Section 103(f) requires compensation only for regular inspections (Pet. App. 99a-105a) and vacated the citation issued by the inspector (*id.* at 106a).[2]

c. The Secretary of Labor petitioned the Commission for review of both ALJ decisions in favor of petitioners. Deciding petitioner Helen Mining Company's case first, the Commission, with two commissioners dissenting, rejected the Secretary's position that the Act had been violated (Pet. App. 47a-80a). The Commission found "dispositive" (*id.* at 60a) a statement by Representative Perkins on the floor of the House indicating that Section 103(f) entitled miners' representatives to participate in both regular and spot inspections, but protected them against loss of pay only for regular inspections. See 123 Cong. Rec. 35410 (1977). Relying upon its decision in *Helen Mining*, the Commission affirmed the ALJ's decision in *Kentland-Elkhorn* (Pet. App. 81a-84a) and reversed the ALJ's decision in *Allied Chemical* (*id.* at 85a-86a). See note 2, *supra*.

3. A divided panel of the court of appeals reversed the Commission (Pet. App. 1a-46a). The court of appeals noted that Section 103(f) states that "whenever a miner *is* entitled to participate in an inspection 'pursuant to' subsection (a), he 'shall suffer no loss of pay during the period of his

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[2]A third case that was consolidated with petitioners' cases in the court of appeals, *Allied Chemical Corp.*, involved the same facts as in *Helen Mining*, but the ALJ held that the Act had been violated and issued an order requiring the operator to compensate the miner for the time spent accompanying the federal inspector (Pet. App. 107a-121a). Allied Chemical has not filed a petition for a writ of certiorari.

participating in the inspection * * *' " (Pet. App. 13a, quoting Section 103(f) (emphasis in original)). The court held that this language indicated unambiguously that "the right to walkaround pay is clearly coextensive with the right to accompany the inspector under subsection (f)" and "there is simply no basis for reading it as supporting the bifurcation of participation and compensation rights espoused in the Commission's decisions" (Pet. App. 13a-14a). The court ruled that the Commission erred in according "decisive weight" (*id.* at 17a) to Representative Perkins' statement, because it conflicted with the plain meaning of the statute and was inconsistent with the conference report, which "conveys the quite contrary impression that the broad walkaround pay rights granted by the Senate bill remained unaffected * * *" (*id.* at 15a-16a). See S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 45 (1977).

Having rejected the Commission's "bifurcation" of walkaround participation and compensation rights, the court then adopted the Secretary's interpretation that both spot and regular inspections are made "pursuant to" Section 103(a) and thus are given participation and compensation rights under Section 103(f) (Pet. App. 19a-26a). The court reasoned that both regular and spot inspections are conducted to carry out the purposes listed in Section 103(a)—to assess imminent danger and compliance with the Act—and therefore are conducted "pursuant to" that provision (Pet. App. 18a-19a). Moreover, because the legislative history indicated a clear intention by Congress to afford miners broad participation rights, the court thought it unlikely that Congress intended to limit these rights to regular inspections (*id.* at 19a-26a). Accordingly, the court held that miners' representatives had the right to participate in the spot inspections at issue here without loss of pay (*id.* at 18a-26a).

Judge Tamm dissented. Because he viewed the language of Section 103(f) as ambiguous, Judge Tamm concluded that the court should have deferred to Representative Perkins' statement that only participation, not compensation, rights attach to spot inspections (Pet. App. 28a-46a).

## ARGUMENT

The decision of the court of appeals is the first judicial interpretation of this aspect of the walkaround pay provisions of the Federal Mine Safety and Health Act of 1977. The court's ruling on a narrow question of statutory construction is reasonable and does not conflict with any decision of this Court or any court of appeals. Therefore, it does not warrant review by this Court.

1. Petitioners' primary contention (Pet. 7-14) is that the court of appeals violated general principles of statutory construction by "ignoring" the clear legislative history, embodied in Representative Perkins' remarks to the House, in construing an "ambiguous" statute. The court of appeals, however, carefully considered the statutory language and *all* of the legislative history of the Act, and merely declined to give "decisive weight" to a single statement in the legislative history that conflicted with the plain meaning of the statute. Section 103(f) of the Act provides that a miners' representative has the right to accompany MSHA personnel during an inspection made "pursuant to" the provisions of Section 103(a) and that "[s]uch representative * * * shall suffer no loss of pay during the period of his participation in the inspection" (30 U.S.C. (Supp. IV) 813(f)). Section 103(f), which is the only provision in the Act that mentions the right to miner participation or the right to walkaround pay, clearly makes the two coextensive.[3] On

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[3]Petitioners assert (Pet. 14-16) that the relationship between the participation and walkaround pay rights ought not to be an issue because the Commission had no reason to discuss participation rights. But this argument, if adopted, would require the Commission and the

this question, the court correctly concluded that the statutory language is "quite unambiguous[]" (Pet. App. 13a).[4]

Based on its holding that Section 103(f) requires participation and walkaround pay to be treated the same, the court concluded that the Commission erred in giving conclusive weight to the statement of Representative Perkins, which described Section 103(f) as allowing participation in spot inspections but not requiring compensation for the time spent on the walkaround. In this regard the court of appeals followed the well-settled principle that statements of legislators and other legislative materials should not be used to "construe a statute contrary to its plain terms" (Pet. App. 13a n.19). See *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). "Such aids are only admissible to solve doubt

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courts to blind themselves to the plain language in the statute that requires the two rights to be accorded the same treatment. It is certainly relevant, in construing one part of a statute, to consider the entire statutory structure. See, *e.g.*, *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

[4]Petitioners contend (Pet. 19) that it would be logical for Congress to compensate miners only for regular inspections, arguing that it is more likely that the effectiveness of a regular inspection would be enhanced by a miner's participation than a spot inspection, which "usually involve[s] narrow, technical procedures." Spot inspections, however, can be quite extensive in scope; this category encompasses any inspection other than one of a mine in its entirety. For example, the inspection at issue in Kentland-Elkhorn was of the entire electrical system of that mine and lasted at least 21 days (Pet. App. 81a). In any event, it is clear that Congress intended that there be a right to participation in spot inspections. Failure to pay a miner during this participation would be contrary to congressional intent since "it is hardly to be expected that a miner, who is not in business for himself, should [participate in health and safety matters] if his activities remain uncompensated." 123 Cong. Rec. 20019-20020 (1977) (remarks of Senator Javits); S. Rep. No. 95-181, 95th Cong., 1st Sess. 28-29 (1977).

and not to create it." *Wisconsin Railroad Commission* v. *Chicago, B. & Q.R.R.*, 257 U.S. 563, 589 (1922).[5]

Alternatively, the court of appeals noted other problems with Representative Perkins' remarks that seriously undercut their reliability as indicia of congressional intent (Pet. App. 15a-17a). For instance, the court pointed out that the statement is not wholly consistent with the Conference Report, which implied that the walkaround pay rights granted by the Senate bill remained unaffected by the changes made by the conference (*id.* at 16a). The Conference Report stated that, on the walkaround question, the conference bill "conforms to the Senate bill," S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 45 (1977), and the Senate Report stated that the Senate bill granted miners' representative "full compensation" for assisting inspectors. S. Rep. No. 95-181, 95th Cong., 1st Sess. 28-29 (1977).

In short, petitioners' assertion (Pet. 9) that the court of appeals "did not seek to discredit the remarks of Representative Perkins by reference to other indicia of legislative intent" is plainly incorrect. The court did not ignore Representative Perkins' statement, but carefully considered and rejected it as the exclusive basis for construing Section 103(f). Whether a particular statement of a single legislator is a reliable indicator of Congress' intent obviously is not an

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[5]Petitioners strain to find ambiguity by stressing (Pet. 10-11) that other provisions of the Act use the phrase "any inspection" while Section 103(f) refers to inspections made "pursuant to * * * [Section 103(a)]." This argument does not change the fact, however, that the phrase "pursuant to * * * [Section 103(a)]" applies to both participation and compensation. There is no ambiguity in the coextensive treatment of the two rights. Thus, regardless of the meaning of the phrase "pursuant to * * * subsection (a)," it controls all rights provided in subsection (f). See Pet. App. 13a. Moreover, as Commissioner Lawson explained in his dissent below (*id.* at 76a n.4), the choice of two different phrases in the statute merely reflects the different derivations of the various provisions of the Act.

issue that warrants review by this Court, particularly where, as here, the decision of the court of appeals is reasonable and is based on other evidence in the legislative history. Moreover, the court below is the first to have considered this question. The District of Columbia Circuit is not the only court empowered to review the decisions of the Commission (30 U.S.C. (Supp. IV) 816); by declining to review in this case, the Court could benefit from the views of other courts of appeals regarding what all concede to be a complex statutory scheme (see Pet. App. 18a (opinion of the court), 36a (Tamm, J., dissenting)).

2. Petitioners' other contention (Pet. 14-20) is that the court of appeals failed to give deference to the Commission's decision interpreting Section 103(f), thus creating a conflict with cases under the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. IV) 651 *et seq.*, concerning the relative deference owed to the Secretary and the Occupational Safety and Health Review Commission. This contention is without merit.

First, the court expressly declined to reach the general question of which agency should be accorded greater deference, because "in this instance the Commission's construction is plainly incorrect and unsupportable by the terms of the Act" (Pet. App. 17a-18a n.26). This conclusion follows the well-settled principle that courts need not defer to an agency interpretation where there is a compelling reason not to do so. *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The principle of deference "[i]s constrained by [the courts'] obligation to honor the clear meaning of a statute * * *." *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979). For the reasons explained above, the court correctly rejected the Commission's interpretation here, adopting instead the

interpretation of the Secretary, which is the only one that "avoids outright conflict with the plain terms of the statute and conforms to the health and safety purposes underlying the Act" (Pet. App. 25a n.43).

Second, decisions interpreting the Occupational Safety and Health Act of 1970 regarding the relative deference to be accorded the Secretary and the Occupational Safety and Health Review Commission are of little use in interpreting the Federal Mine Health and Safety Act of 1977. The Senate Committee that drafted the 1977 Mine Act specifically stated that "[s]ince the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 95-181, *supra*, at 49. Thus, precedent under OSHA on the issue of agency deference does not control the outcome under the Mine Act, which has a very different legislative history. Compare *Brennan* v. *Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1262-1263 (4th Cir. 1974).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and
UNITED MINE WORKERS OF AMERICA,
*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

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## QUESTION PRESENTED

1. Whether the Court of Appeals correctly determined that section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f), grants miners the right to accompany a federal inspector, without loss of pay, not only during the routine inspections of the entire mine, but also during the spot inspections, conducted at frequent intervals at particularly dangerous mines, and in response to a miner's report that a violation or imminent danger exists.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-33

THE HELEN MINING COMPANY, and
KENTLAND-ELKHORN COAL CORPORATION,
*Petitioners,*

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
and
UNITED MINE WORKERS OF AMERICA,
*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

The respondent United Mine Workers of America respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. The Court's opinion is titled *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission* and is reported at 671 F.2d 615. The opinion was included as Appendix A to the petition for writ of certiorari.

## STATEMENT OF THE CASE

This case involves the proper statutory construction of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f), (Supp. IV 1980) (hereinafter "the Act"). That statutory provision affords miners, or their representatives, the right to participate in certain inspections conducted by the Mine Safety and Health Administration (MSHA) and provides further that miners will suffer no loss of pay as a result of exercising that right. This statutory right is commonly known as the "walkaround right." The issue in this case is whether the walkaround right applies to only one type of inspection conducted under the Act or whether it applies to a broad range of inspection activity conducted by the Secretary of Labor pursuant to his enforcement responsibilities under the Act.

A miner's walkaround right under section 103(f) arises in connection with inspections "made pursuant to the provisions of subsection (a)." Section 103(a) of the Act (30 U.S.C. § 813(a), Supp. IV 1980) is a broad authorizing provision which mandates, among other things, that the Secretary of Labor conduct "frequent inspections" for the purpose of determining "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards." To enable the Secretary to carry out his inspection duties, section 103(a) grants the "right of entry to, upon, or through any coal or other mine," and prohibits advance notice of inspections. Section 103(a) also requires that underground mines be inspected in their entirety at least four times a year, and surface mines at least twice a year. These routine inspections of the entire mine are commonly known as "regular" inspections.

In addition to these regular inspections of the entire mine, the Secretary conducts frequent spot inspections. Such spot inspections may cover all or part of a mine and may focus on one or more types of hazards such as electrical, roof control, ventilation, or health problems. Under section 103(i), 30 U.S.C. § 813(i) (Supp. IV 1980), such spot inspections are required to be conducted with a certain frequency at a mine which liberates excessive amounts of methane or contains some other especially hazardous condition. A spot inspection is also triggered by a miner's complaint of a violation or dangerous condition under section 103(g) of the Act (30 U.S.C. § 813(g) Supp. IV 1980).

On April 25, 1978, the Secretary of Labor published an Interpretive Bulletin explaining how he intended to enforce the miners' walkaround right under section 103(f) of the Act (43 Fed. Reg. 17,546-49). The Interpretive Bulletin stated that, under section 103(f), "protection against loss of pay during participation in inspections is as broad as the participation right itself." (*Id.* at 17,548-49). The Secretary concluded that miners would be entitled to accompany inspectors, with no loss of pay, not only on the regular inspections, but on spot and miner-requested inspections, as well. Since each of these inspections are conducted for one of the purposes enumerated in section 103(a), the Secretary concluded that such inspections are "made pursuant to the provisions of subsection (a)." *Id.* at 17,547-48. The Secretary concluded that the miner's presence on such occasions would be particularly useful in aiding the inspection (*Id.* at 17,549).

Each of the three cases consolidated for review before the District of Columbia Circuit arose when the operator refused to compensate the miners' representative for time spent accompanying the federal inspector on various

spot inspections. In each case, the Secretary took appropriate enforcement action in accordance with his interpretive bulletin.[1] The operators challenged the Secretary's actions in proceedings before the Federal Mine Safety and Health Review Commission. There, the operators argued that the only inspections made "pursuant to the provisions of subsection (a)" were the regular inspections of the entire mine. Since the inspections in question did not come under that category, the operators contended that no violation of section 103(f) had occurred.

The Federal Mine Safety and Health Review Commission issued a decision which distinguished between the miner's right to accompany the federal inspector and the right to be paid for such activity. The Commission determined that, while the right to accompany inspectors applied to both the regular and spot inspections, the operator was required to compensate the miner only on the regular inspections. In reaching its decision, the Commission relied solely on remarks made by Congressman Perkins before the House passage of the 1977 Act. The Commission found the remarks to be "dispositive" of the question of how Congress intended section 103(f) to be ap-

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[1] Kentland-Elkhorn Coal Corporation and Helen Mining Company were issued citations and withdrawal orders and assessed a civil penalty for violating section 103(f) of the Act. This enforcement activity is authorized by sections 104(a) and (b) and section 110(a) of the Act, 30 U.S.C. §§ 814(a) and (b), and § 820 (Supp. IV 1980).

Allied Chemical Corporation was issued a complaint, charging it with interference with the exercise of the statutory rights of the representative of the miners, in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1) (Supp. IV 1980).

plied. (P. 60a).[2] The Court of Appeals reversed, finding the Commission's construction to be contrary to the unambiguous language of section 103(f). The Court held that the miners' right to be compensated under section 103(f) was clearly coextensive with their right to participate in the inspection, and that such participation right extended to spot inspections and inspections conducted in response to a miner's request.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW DOES NOT RAISE THE QUESTIONS PRESENTED IN THE PETITION

#### A. The Decision Below Is Clearly Correct And Was Decided In Accordance With This Court's Directions Regarding Statutory Construction

Petitioners urge review on the grounds that the Court of Appeals ignored "clear, authoritative, and dispositive legislative history in the face of an ambiguous statute." (P. iii). What the Court of Appeals actually did, however, was refuse to construe the statute in a manner contrary to its plain language, solely on the basis of a statement by a single member of Congress. While recognizing the appropriateness of resorting to legislative history when the words of a statute are ambiguous, the Court of Appeals observed that, "It is equally well-settled that, before resorting to legislative history, a court or administrative body should first look to the language of the law itself to determine its meaning," citing *Consumer Product Safety Commission* v. *GTE, Sylvania, Inc.*, 447 U.S.

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[2] "P" is used herein to refer to the certiorari petition and the appendix to it.

102, 108 (1980); and *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). (P. 12a-13a).

> Section 103(f) provides that:
>
> [miner representatives may accompany federal inspectors] during the physical inspection of any . . . mine made pursuant to the provisions of subsection (a) . . . . Such representative of miners . . . shall suffer no loss of pay during the period of his participation in the inspection made under this subsection.

Given the fact that the right to compensation is defined by precisely the same reference as the right to participate in the inspection, the Court of Appeals correctly concluded that, under section 103(f), the two are coextensive and that there was "simply no basis for reading it as supporting the bifurcation of participation and compensation rights espoused in the Commission's decisions." The unambiguous nature of the coextensiveness question contained "so plain a mandate" that the Court concluded that "whenever miner representatives have the right to accompany an inspector, they also have the right to be paid." (P. 14a n. 21).[3]

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[3] Petitioners attempt to characterize the Commission's bifurcation of the walkaround right as irrelevant, claiming the right of a miner to accompany inspectors without pay on spot inspections is "unlikely ever to arise because the wage agreement between the miners and mine operators provides for a walkaround right on all inspections." (P. 15 n. 18). This assertion is surprising for two reasons: First, the wage agreement contains no such explicit walkaround right (even if it did, there is no way of knowing whether the Union would be able to retain such right in future agreements). Secondly, the assertion represents a most cavalier attitude toward the rights of the many thousands of miners who are not under a wage agreement, and who must rely solely on the terms of the statute for any right to participate in inspections.

Petitioners contend that the Court erred by not construing section 103(f) in accordance with the statement of Representative Carl Perkins. The Congressman's statement indicated that it was the intent of the Conference Committee to permit miners to accompany inspectors on all inspections conducted by federal inspectors, but to require payment only on the regular inspections of the entire mine. Petitioners assert that the court "failed to consider Representative Perkins' remarks *at all.*" (P. 10). In fact, the Court did consider the Congressman's statement but, for several reasons, concluded that, "it could hardly be said to reflect the unambiguous intent of the Congress." (P. 15a).

The Court observed that the statement was made three weeks after the Senate had completed its consideration of the Conference Report and had voted passage of the bill. Given the fact that the statement conflicts with a plain requirement of the statute, the Court found it significant that there was no indication that "Congressman Perkins' gloss on section 103(f) was ever brought to the attention of or approved by the Senate." (P. 15a n. 23). The Court observed further that the Conference Report itself "does not explicitly or by inference, mention the agreement attested to by Congressman Perkins . . . ." (P. 16a). Indeed, the Court found, the report conveyed "the quite contrary impression that the broad walkaround pay rights granted by the Senate bill remained unaffected by the changes made by the conference." (*Id.*) Considering these facts, the Court concluded that the statement of the Congressman did not justify construing the statute in a manner contrary to its plain terms. The Commission's

decisions, which were wholly dependent upon the statement, could, therefore, not be upheld.[4]

It is obvious, therefore, that Congressman Perkins' remarks do not provide those "rare and exceptional circumstances" which justify a court extending its inquiry beyond the plain language of the statute. *Howe* v. *Smith*, 452 U.S. 480, 483 (1981). The decision below does not depart from the directions of this Court. The cases relied on by petitioner involved evidence of contrary congressional intent of an entirely different nature than the legislative history relied upon by petitioners in this case. In *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976), this Court concluded that materials regulated by the Atomic Energy Act were excluded from the definition of pollutant contained in the Federal Water Pollution Control Act. In so holding, however, this Court found that the legislative history of the Water Pollution Control Act spoke "with force" on the question of statutory construction before it. The House Committee Report was "quite explicit" concerning their intention to exclude such materials, and many legislators had indicated their reliance on such report. This Court found, further, that to include such materials under the coverage of that Act would be to take a position that had been contained in an amendment expressly defeated by Congress. *Train*, *supra* at 11-12, 21-22.

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[4] Petitioners stress the important role that Congressman Perkins, as sponsor and chief House conferee, played in the passage of the Act. As this Court has held, however,: "Ordinarily, even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Commission*, *supra* at 118.

In *Watt* v. *Alaska*, 451 U.S. 259 (1981), this Court construed the term "minerals" in the National Wildlife Refuge Act as applying only to minerals contained in acquired (as opposed to existing) refuge lands. To have applied a literal interpretation of the term, however, would have required a determination that Congress had repealed a provision of another statute, by implication, an approach not favored by this Court.[5]

Having determined that Congressman Perkins' remarks did not justify a departure from the plain language of the statute and that such language made the right to payment as broad as the right to participate in inspections, the Court turned its attention to determining the scope of that participation right. The participation right arises during inspections conducted "pursuant to the provisions of subsection (a) [of section 103]." Concluding that

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[5] The other cases relied on by petitioner are equally unsupportive, since none of them construe a statute contrary to its plain terms. In *Woelke & Romero Framing, Inc.* v. *NLRB*, 50 U.S.L.W. 4538, 4544 (1982), the interpretation urged by the NLRB, unlike that of the Commission, was found to be supported by the statute's "plain language as well as its legislative history." In *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, *supra* at 109, this Court held that a disclosure pursuant to a Freedom of Information Act Request was a public disclosure "within the plain meaning of section 6(b)(1) of the Consumer Product Safety Act."

In *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 443, 449 (1955), this court held that section 301 of the Labor Management Relations Act was a mere procedural provision directing the federal courts to treat a labor union as though it were a natural or corporate legal person. Such holding was found to be the result of giving the statutory provision "the meaning its language spontaneously yields" and the legislative history was found to reinforce "the meaning conveyed by the statute itself . . . ."

this section of 103(f) "was not wholly unambiguous," the Court conducted a thorough analysis of the language and the legislative history of sections 103(a) and 103(f) (P. 18a).

The Court found that the regular inspections were not the only ones mandated by section 103(a), since that provision directs the Secretary to conduct "frequent [other] inspections" for the purpose of determining "whether an imminent danger exists" and whether "there is compliance with the mandatory health or safety standards." (*Id.*) Observing that the right of the Department of Labor to enter the mines without a warrant flowed solely from subsection (a), and that the prohibition against advance notice contained in that subsection applied to the inspections in this case, the Court determined that the basic authority for the inspections at issue in this case rests in subsection 103(a). Noting that the statutory language at issue in this case was adopted from the Senate version of the Act, the Court found the Senate Report fortified its conclusion that spot and miner-requested inspections are conducted pursuant to subsection (a).

In rejecting a construction which would limit the miners' walkaround right, the Court kept in mind "the broad health and safety purpose underlying the Act, in general, and the miners' walkaround rights, in particular . . . ." (P. 25a). The Court concluded that there was,

> no reasonable basis for concluding that Congress intended to grant broad walkaround rights to miner representatives for routine inspections but to deny

such rights with respect to inspections conducted to deal with specific safety hazards. (P. 23a)[6]

Since the inspections giving rise to these proceedings were ones in which a miner had the right to accompany the inspector without loss of pay, the Court reversed the Commission's decisions and remanded for further proceedings consistent with the Court's decision.

### B. There Is No Conflict Of Decisions

Petitioners argue that, by failing to give any weight to the Commission's decision, the Court of Appeals' decision conflicts with those of the Fourth, Sixth, and Eighth Circuits. In support of this contention, petitioner cites cases in which these Circuits have accorded deference to decisions of the Occupational Safety and Health Review Commission. The cases relied on by petitioner are inapplicable to the instant proceeding. With one exception, none of the cases cited by petitioner involve an agency decision that was contrary to the terms of the statute, as was the decision of the Mine Safety and Health Review Commission below. In the one case cited by petitioner in which the agency did deviate from the statute, the court did not defer to the agency, but applied the terms of the statute.[7]

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[6] The Court noted the paradoxical nature of limiting a miner's walkaround right to the routine regular inspections. Under such a holding, a miner who requests a special inspection would not be paid to personally accompany the inspector to show the condition or explain why it is dangerous. Miners would be denied the right to payment on spot methane inspections, although a principal impetus for enactment of the 1977 statute was the Scotia Mine disaster in which several miners and federal inspectors were killed as a result of two explosions of accumulated methane gas.

[7] *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127, 131 (6th Cir. 1978).

In the other cases relied on by petitioner, the courts determined either that the agency was "effecting the plain meaning of the statute,"[8] or addressing a question (employer liability on a multiemployer worksite) that "the statute itself does not answer."[9]

Petitioners argue that the Court of Appeals erred by not deferring to the Commission; yet, they ignore the fact that the Secretary of Labor's interpretation of the law and regulations is also entitled to deference by the Courts of Appeals.[10] The Court of Appeals found that the Secretary's interpretation of section 103(f) was the only one that "avoids outright conflict with the plain terms of the statute and conforms to the health and safety purpose underlying the Act . . ." and was therefore "the one to be preferred." (P. 25a n. 43).

Implicitly recognizing that the Commission's narrow construction of section 103(f) conflicts with the broad health and safety purposes underlying the Act, petitioners speculate as to various reasons why Congress might have wanted to compensate miners only on the regular inspection (P. 19). Petitioners strive to distinguish between the regular inspections and spot inspections and

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[8] *Dunlop* v. *Rockwell International*, 540 F.2d 1283, 1288 (6th Cir. 1976).

[9] *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1260 (4th Cir. 1974). *See also Marshall* v. *Knutson Construction Co.*, 566 F.2d 596 (8th Cir. 1977); *Bratton Corp.* v. *Occupational Safety and Health Review Commission*, 590 F.2d 273 (8th Cir. 1979).

[10] *See* S. Rep. 95-181, 95th Cong., 1st Sess., at 49 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978).

assert, without support, that the miner's assistance is unnecessary on the spot inspections. None of these alleged distinctions were relied on by the Commission, however.

As the Court of Appeals noted, the Scotia tragedy was a primary impetus to the passage of the 1977 Act. The report on that disaster prepared by the Staff of the House Committee on Education and Labor noted the inherent limitations upon the ability of the inspectors to conduct an adequate spot inspection when they are working alone:

> By definition, spot inspections are very limited in both scope and time. When conducting such inspections, MESA inspectors usually look for a specific mine condition and have only a few hours in which to complete the work. The result, unfortunately, is that an inspector very often will miss hazardous conditions which exist independent of those he is checking for, and also, his expertise may not be appropriate for recognizing other hazards . . . . (STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, SUBCOMM. ON LABOR STANDARDS, (94th Cong., 2d Sess., SCOTIA COAL MINE DISASTER 27 (Comm. Print 1976)).

The Court of Appeals was correct when it concluded that there was simply no basis for concluding that Congress intended to limit a miner's ability to participate in the spot inspections. Indeed, the Commission did not even attempt to supply reasons which would support such a conclusion, but merely relied on Congressman Perkins' remarks as dispositive. The Court correctly determined that such an approach, contrary to both the language and purpose of the statute was not entitled to deference.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
# Supreme Court of the United States

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, AND
KENTLAND-ELKHORN COAL CORPORATION,
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v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
and
UNITED MINE WORKERS OF AMERICA,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN MINING CONGRESS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Pursuant to Rules 36 and 42 of the Rules of the Supreme Court of the United States, the American Mining Congress (AMC) moves the Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by The Helen Mining Company and Kentland-Elkhorn Coal Corporation July 8, 1982.

Petitioners Helen Mining Company and Kentland-Elkhorn Coal Corporation have consented to this filing as has the federal respondent through the Solicitor General of the United States. These consents are attached as Appendices A and B to the brief. Counsel for Respondent, United Mine Workers of America, has refused consent. AMC's request for that consent is attached as Appendix C.

**Nature Of Applicant American Mining Congress' Interest and Reasons For Granting Leave To File as *Amicus***

The American Mining Congress (AMC) is an industry association representing the producers of most of the Nation's coal, metals, agricultural and industrial minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, consulting, and financial institutions serving the mining industry. Petitioners Helen Mining Co. and Kentland-Elkhorn Coal Corp. are both member companies of AMC.

Since the issuance of the decision of the District of Columbia Circuit Court of Appeals in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) ("*UMWA*"), the Mine Safety and Health Administration (MSHA) has reverted to its policy of requiring compensation to miners who accompany MSHA inspectors during all enforcement inspections—both those entire mine inspections required by the 1977 Mine Safety and Health Act (four underground and two surface inspections yearly) and numerous "spot inspections" undertaken by MSHA for specific purposes.

Prior to the *UMWA* decision, the independent Federal Mine Safety and Health Review Commission, the

statutorily delegated authority with respect to interpretation of the 1977 Act, had ruled that the 1977 Act and its legislative history restricted compensation—so-called "walkaround pay"—to the regular entire mine inspections mandated by the Act.

Consequently, AMC member companies are presently faced with citations, civil penalties, possible mine closure orders and potential charges of miner discrimination if they do not accede to MSHA's demands that miners be compensated for participation in all enforcement inspections.

The court's decision in *UMWA*, therefore, has far-reaching effects upon all mine operators—coal and non-coal; surface and underground—that transcend the issue of walkaround pay in the particular instances arising in the petitioners' case.

Beyond the issue of walkaround pay is the overriding question of the statutory scheme for distinguishing between administrative enforcement and administrative review of that enforcement as envisioned by Congress in the 1977 Act.

In the instant case, the Circuit Court of Appeals for the District of Columbia has chosen to ignore the policy-making role of the expert and independent Federal Mine Safety and Health Review Commission in favor of deferring to an interpretive memo of the Secretary of Labor that asserted unrestricted rights to walkaround pay for all enforcement inspections.

By doing so, the court has set a pernicious precedent that could well affect all future decisions of the Review Commission respecting mine safety and health law or policy.

AMC and its member companies viewed Congress' separation of enforcement and adjudicative powers between the Secretary of Labor and the Review Commission as a positive step toward unbiased and independent review of unwarranted enforcement actions.

By dismissing the expertise of the Review Commission in matters of law, policy, and general oversight of enforcement activities, the court's decision seriously affects expectations among mine operators who seek independent review before the Commission and its judges on other vital policy issues.

In view of the widespread ramifications for the mining industry owing to the D.C. Circuit Court of Appeals' decision, the American Mining Congress respectfully submits that the accompanying brief *amicus curiae* would be of benefit to the Court both as to its decision whether or not to grant the petition and, if it is granted, as to the merits of the case.

Respectfully Submitted,

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## ISSUES PRESENTED

Whether the Court of Appeals for the District of Columbia erred by using the plain meaning rule to interpret ambiguous statutory language while concurrently ignoring contrary and dispositive legislative history.

Whether the Court of Appeals erred in failing to grant any deference to the decision of the expert and independent Federal Mine Safety and Health Review Commission.*

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* To avoid duplication, AMC has limited its brief to these two critical issues and the major arguments related thereto. However, AMC fully endorses Petitioner's brief and commends to the Court's attention the excellent arguments contained therein.

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*Secretary of Labor* v. *Helen Mining Co.*, FMSHRC, Docket No. PITT 79-11-P (Nov. 21, 1979) ..... 5

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*Watt* v. *Alaska*, 451 U.S. 259 (1981) ..... 4

*Ziegler Coal Co.* v. *Marshall*, 502 F. Supp. 1322 (D.C. Ill. 1980) ..... 8

STATUTES:

30 U.S.C. § 813 ..... 2

30 U.S.C. § 823 ..... 8

LEGISLATIVE HISTORY:

123 Cong. Rec. 35, 410 (daily ed. Oct. 27, 1977) *reprinted in* Subcom. on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) ..... 4

*Nomination Hearings, Members of Federal Mine Safety and Health Review Commission, Before the Senate Committee on Human Resources*, 95th Cong., 2d Sess. (1978) ..... 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-33

---

THE HELEN MINING COMPANY, AND
KENTLAND-ELKHORN COAL CORPORATION,
*Petitioners,*

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

and

UNITED MINE WORKERS OF AMERICA,
*Respondents.*

---

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

---

## BRIEF AMICUS CURIAE OF THE AMERICAN MINING CONGRESS

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### STATEMENT OF INTEREST

Pursuant to Rule 36.3, the American Mining Congress (AMC) files this brief as *amicus curiae* in support of petitioners. Counsel for all parties except the United Mine Workers of America have consented to the filing of this brief.

The American Mining Congress is a national trade association composed of Unitied States companies that

produce most of the Nation's metals, coal and industrial minerals; manufacturers of mining and milling processing machinery, equipment and supplies; and engineering and contracting companies and banks that serve the mining industry. AMC, founded in 1897, was created to serve as both a clearing house for information and a coordinator for action on behalf of the mining industry with regard to matters pending in Congress, the Executive Branch, and independent agencies; and to work for constructive policies that will best enable the mining industry to serve the needs of the Nation.

AMC and its member companies have a profound interest in the legislation interpreted by the court below. If the Petition for a writ is not granted and the decision of the Circuit Court of Appeals for the District of Columbia is not reversed, the interests of AMC and its member companies will be substantially and adversely affected.

## STATEMENT OF THE CASE

The 1977 Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* (Supp. IV 1980) ("Act" or "1977 Act"), is a comprehensive and detailed scheme for the national regulation of health and safety at *all* mining operations. The Act requires the Department of Labor's Mine Safety and Health Administration ("MSHA") to inspect "in its entirety" each underground mine at least four times annually and each surface mine at least two times annually. Section 103(a), 30 U.S.C. § 813(a) ("regular entire mine inspections" or "regular inspections").

The Act also authorizes the Secretary to conduct other inspections in addition to the regular entire mine inspections.

This case involves the interpretation of Section 103(f) of the Act: the right of miners to be compensated for time

spent accompanying MSHA inspectors during their inspections of the Nation's mines.

The Circuit Court of Appeals for the District of Columbia, in a two to one decision, reversed the interpretation of the expert and independent Federal Mine Safety and Health Review Commission (Review Commission), which construed the Act as limiting walkaround pay to regular entire mine inspections.

In calendar year 1980, MSHA conducted 15,148 regular inspections and 78,911 "spot" inspections at coal mines, and 22,555 regular inspections and 9,453 "spot" inspections at noncoal mines during fiscal year 1980.[1] The sheer magnitude of these numbers indicates the profound adverse affect of the circuit court's decision on the mining industry. Mine operators are now faced with citations, civil penalties, possible mine closure orders and potential charges of miner discriminaion if they do not accede to MSHA's demands that miners be compensated for participation in all enforcement inspections.

Unless the petition for writ is granted, the D.C. Circuit Court's decision will have an adverse impact on all mine operators—coal and noncoal; surface and underground—on a scale that transcends the particular circumstances in petitioners' case.

The decision also carries negative implications for other matters of mine safety and health policy affecting mine operators. The Circuit Court of Appeals, in reaching its decision, ignored the policymaking role of the Review Commission and deferred instead to the views of the Secretary of Labor.

---

[1] AMC respectfully requests that the Court take judicial notice of this publicly available MSHA data. See Appendix D.

By dismissing the expertise of the Review Commission, the court calls into question that agency's authority with respect to other vital policy issues affecting the mining industry.

### I.A. THE CIRCUIT COURT'S DECISION IS BASED UPON AN UNWARRANTED AND ERRONEOUS INVOCATION OF THE "PLAIN MEANING" RULE

The majority opinion reaches its conclusion that walkaround pay is required for all enforcement inspections by disingenuously finding no ambiguity in Section 103 and then invoking the "plain meaning" rule.

The application of the "plain meaning" rule has been severely restricted by this court. See e.g. *Watt* v. *Alaska*, 451 U.S. 259 (1981). Even if the rule were still favored, the record in this case more than amply demonstrates that Section 103 is indeed ambiguous and in need of clarification through resort to the legislative history.

The ambiguity of Section 103 was recognized first in the Congress, before the passage of the Act:

> Mr. Speaker, before concluding my remarks, I would like to address one aspect of the conference report that seems to be somewhat ambiguous.

Statement of Representative Carl Perkins, 123 Cong. Rec. 35, 410 (Daily Ed. Oct. 27, 1977), reprinted in Sub. Com. on Labor of the Senate Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of The Federal Mine Safety and Health Act of 1977 (1978) ("Legislative History") at 1356-58.

Upon analyzing Section 103, a majority of the Federal Mine Safety and Health Review Commission stated:

> Both parties [the Secretary and Helen Mining Co.] claim that the plain language of the statute

> unambiguously supports their opposing views. We find that the statute is ambiguous and does not clearly favor either position.

*Secretary of Labor* v. *Helen Mining Co.*, FMSHRC, Docket No. PITT 79-11-P (Nov. 21, 1979), *rev'd sub nom. United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) (hereafter "Helen Mining"). Brief for Petitioner at 55a.

The statutory ambiguity is further exemplified by the separate dissents filed by two other Commissioners. *Id.* at 62a, 73a.

Lastly, even the circuit majority admitted the statutory ambiguity:

> This statutory language [Section 103] is susceptible of three possible interpretations. . . .
>
> . . . .
>
> Although on this issue the statute is not wholly unambiguous. . . .

*United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) Brief for Petitioner at 10a, 18a (hereafter "UMWA").

Clearly, the statutory ambiguity exists and the circuit court's invocation of the plain meaning rule was gross error requiring reversal.

### I.B. THE CIRCUIT COURT'S DECISION IS AN INFRINGEMENT UPON THE SOLE POWER OF CONGRESS TO LEGISLATE

The separation of powers among the three branches of the Federal government is one of the basic tenets upon which the republic was built. That only Congress can legislate is a principal established by the Constitution and

revered by this Court. See e.g. *Northwest Airlines, Inc.* v. *Transportation Workers Union of America, AFL-CIO*, 451 U.S. 76 (1981).

The circuit court has defied this principle in establishing, by convoluted judicial interpretation, a statutory right which the Congress expressly refused to grant.

First, the circuit court misapplied the plain meaning rule to achieve what it deemed a desirable policy result. Second, the court grossly mischaracterized the Commission's decision by stating that "in reaching its decision, the Commission relied exclusively upon a statement by Rep. Carl Perkins. . . ." *UMWA*, Brief of Petitioner at 11a.

The Commission, on the contrary, began with a detailed analysis of the statute and concluded that it limited walkaround compensation rights. Thereupon, the Commission reviewed the entire legislative history, seeking guidance as to the scope of the limitation on compensation. The Commission stated that:

> [T]he Secretary has not pointed to, nor have we found, a subsequent statement by any conferee or other member of Congress that the walkaround pay right extends beyond regular inspections, or disallowing Mr. Perkins' statement of the conferees intention.

*Helen Mining*, Brief for Petitioner at 60a.

Chairman Perkins' statement, expressing the clear intent of the conferees, provided unequivocal proof that compensation for walkaround was to be limited to the four underground and two surface regular entire mine inspections required to be made each year.

The circuit court cavalierly dismissed Perkins' statement by asserting that the Commission erroneously re-

lied upon it in light of the "clear and unambiguous" language of Section 103. Yet, paradoxically, the majority opinion buttresses its interpretation by resorting to other portions of the legislative history. These portions of the legislative history fail to address the compensation right with the same specificity as the statement of Rep. Perkins, Chairman of the Conference Committee and Chairman of the House Committee that drafted the House bill, and who, in his remarks as floor manager of the bill, explicitly stated that he was relaying the understanding and intent of the House and Senate Conferees.

The court's overtly selective review of the legislative history is alone ground for reversal. This selectivity is best explained by the words of Judge Tamm in his dissent:

> Although I recognize the attractiveness of the majority's result, I believe it impermissibly crosses the line that divides construction of the statute to effectuate the will of Congress from construction intended to achieve a preferable policy conclusion.

*UMWA*, Brief for Petitioner at 281.

In one of the original decisions giving rise to this proceeding, Administrative Law Judge Merlin stated the matter succinctly:

> As the Solicitor [of Labor] has persuasively stated, it may be desirable to compensate miner representatives who accompany MSHA inspectors on all inspections. This, however, is not what the Act says. . . . I cannot legislate and neither can the Secretary.

*Secretary of Labor* v. *Helen Mining Co.*, FMSHRC, Docket No. PITT 79-11-P (Apr. 11, 1979) *aff'd Helen Mining*, Brief for Petitioner at 92a.

AMC respectfully submits that the Circuit Court of Appeals for the District of Columbia should not be permitted to legislate either.

## II. THE CIRCUIT COURT'S OPINION RECKLESSLY SKEWS THE REGULATORY AND ADJUDICATORY SCHEME FASHIONED BY CONGRESS IN THE 1977 ACT.

Prior to the passage of the 1977 Act, mine safety and health was regulated by the Secretary of the Interior who was both prosecutor and judge through his enforcement arm, the Mining Enforcement and Safety Administration (MESA) and a surrogate, quasi-judicial body, the Board of Mine Operations Appeals. Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.* (amended 1977).

When Congress transferred jurisdiction over mine safety and health to the Department of Labor, it acknowledged the inherent unfairness in the prior adjudicatory system. The Federal Mine Safety and Health Review Commission was created as a totally independent judicial agency to serve as an expert neutral arbiter in disputes among MSHA, operators, and miners. *Council of the Southern Mountains* v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981).

Congress vested the Commission with authority to pass upon "[s]ubstantial questions of law, policy, or discretion" and explicitly circumscribed the scope of review of Commission decisions by circuit courts of appeals. 30 U.S.C. 823(d)(2)(A)(ii). *Duval Corp.* v. *Donovan*, 650 F.2d 1051 (9th Cir. 1981); *Ziegler Coal Co.* v. *Marshall*, 502 F. Supp. 1322 (D.C. Ill. 1980); *Mid-Continent Coal and Coke* v. *Federal Mine Safety and Health Review Commission*, 2 MSHC 1450 (unreported dec. No. 79-2271 9th Cir. Sept. 24, 1981).

Perhaps the most precise description of the Commission's role is that expressed by Senator Williams, one of the Act's principal authors, on the occasion of the nomination hearing for the five original Commissioners:

> It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.

*Nomination Hearings, Members of the Federal Mine Safety and Health Review Commission Before the Senate Committee on Human Resources*, 95th Cong., 2d Sess., 1 (1978).

In its decision, the circuit court ignored the importance of the Review Commission as the ultimate administrative authority regarding the interpretation of the 1977 Act.

Rather than according due deference to the Commission's policymaking and judicial expertise, the court deferred to the less than impartial enforcing entity, the Secretary of Labor, for guidance in the interpretation of Section 103. This misplaced deference eschews a carefully crafted Congressional enforcement and adjudicative scheme wherein the Secretary is merely one among a number of parties litigant before the wholly independent Review Commission.

Established case law relative to the Commission's counterpart, the Occupational Safety and Health Review Commission, provides conclusive precedent for affording due deference to the interpretive decisions of an independent, quasi-judicial administrative agency. *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127 (6th Cir.

1978); *Dunlop* v. *Rockwell International*, 540 F.2d 1283 (6th Cir. 1976); *Brennan* v. *Gilles and Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974).

The circuit court's decision ignores the Commission's statutory role, fails to accord due deference to the Commission's expertise, and must be reversed.

## CONCLUSION

The circuit court's reversal of the Review Commission's decision is based upon a misplaced reliance upon the plain meaning rule. The court further erred by expansively legislating rights that Congress explicitly witheld. Lastly, the court failed to accord proper deference to the policymaking and interpretive expertise granted by Congress to the Review Commission.

For these reasons, petitioners' writ of *certiorari* should be granted and the circuit court's decision should be reversed.

Respectfully submitted,

HENRY CHAJET, *Counsel of Record*
MICHAEL F. DUFFY, *Of Counsel*
Attorneys For The
American Mining Congress

# APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

---

THE HELEN MINING COMPANY, and
KENTLAND-ELKHORN COAL CORPORATION,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

and

UNITED MINE WORKERS OF AMERICA,

Respondents.

---

CONSENT OF PARTIES TO THE FILING
OF AN AMICUS CURIAE BRIEF BY
THE AMERICAN MINING CONGRESS

---

The parties in the above-captioned case consent to the filing of an Amicus Curiae Brief by the American Mining Congress.

Richard McMillan, Jr.
The Helen Mining Company and
Kentland-Elkhorn Coal Corporation

# APPENDIX B

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

July 29, 1982

Michael P. Duffy, Esquire
Henry Chajet, Esquire
American Mining Congress
Suite 300
1920 N Street, N. W.
Washington, D. C. 20036

Re: Helen Mining Company and Kentland-Elkhorn Coal Corporation v. Raymond J. Donovan, Secretary of Labor, et al., No. 82-33

Dear Messrs. Duffy and Chajet:

In response to your letter of July 23, 1982, I hereby consent, on behalf of the federal respondent, to the filing of a brief amicus curiae on behalf of The American Mining Congress (AMC) in this case.

Sincerely,

Rex E. Lee
Solicitor General

# APPENDIX C

AMERICAN MINING CONGRESS
SUITE 300
1920 N STREET NW
WASHINGTON
DC 20036
202-861-2800
TWX 710-822-0126

Officers
Chairman
Charles F. Barber
Vice Chairman and Chairman, Finance Committee
Paul W. Douglas
Vice Chairmen
N.T. Carruth
John C. Duncan
John A. Love
Ralph E. Bailey
George B. Munroe
Pierre Gousseland
Thomas Marshall
President
J. Allen Overton, Jr.
Secretary and Treasurer
Harry J. Dworznik
Directors
C.J. Potter, Indiana PA
*N.T. Carruth, Greenwich
George B. Munroe, New York
Robert H. Allen, Houston
Shaw Barker, Jr., Lexington KY
P. Makapoff, New York
Charles F. Barber, New York
Elton Hoyt III, Cleveland
Otis Bowen, Jr., Cleveland
John C. Duncan, New York
John A. Love, Denver
Robert W. Hobson, Greenwich
Richard A. Lewis, Norristown IL
E.B. Leisenring, Jr., Philadelphia
George E. Arwood, Tucson
Ralph E. Bailey, Stamford
Paul W. Douglas, New York
P.C. Kraft, Jr., Danbury CT
R.E. McElhaney, Pittsburgh
John J. Dwyer, Cleveland
Samuel K. Sorrel, Cleveland
James W. Wilcox, Pittsburgh
Thomas A. Hudson, Wanaque/Little NJ
Perry Gousseland, Greenwich
A.M. Wilson, San Francisco
Robert H. Quenon, St. Louis
Ralph F. Cox, Denver
Thomas D. Barrow, Stamford
Fred A. McPherson, Oklahoma City
W.A. Griffith, Walker ID
Robert F. Anderson, Cleveland
Calvin A. Campbell, Jr., Chicago
Harry M. Conger, San Francisco
Robert M. McCann, Bakersfield
Richard G. Miller, Jr., Chicago
Walter E. Masterman, Jr., Oakland
William M. Troutman, Cleveland
R.J. Cary, Dallas
Thomas Marshall, Pittsburgh
William M. McCardell, New York
Richard D. McKinzie, Stamford
Michael A. Murphy, Los Angeles
Charles W. Parry, Pittsburgh
†Raymond F. Talbot, Ft. Lauderdale
Van MacGregor, Greenwich
*Immediate Past Chairman
†Honorary

July 23, 1982

Mr. Harrison Combs
General Counsel
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

RE: The Helen Mining Co., et al.
v. Donovan, et al.
E. Ct. No. 82-33

Dear Mr. Combs:

The American Mining Congress seeks to file a brief as amicus curiae in the above-referenced case in support of the Helen Mining Co.'s and Kentland-Elkhorn Coal Corp.'s petition for a writ of certiorari to the U.S. Supreme Court. It is our intent that, if filed, the brief would also serve as our statement on the merits.

The American Mining Congress (AMC) is an industry association representing the producers of most of the nation's metals, coal, and agricultural and industrial minerals. As such, we have a strong interest in whether the petition is granted as well as in the ultimate disposition of the case.

Accordingly, we request your consent to file this brief. We have enclosed a consent form for this purpose.

Sincerely,

Henry Chajet

Michael F. Duffy

Counsel for the
American Mining Congress

# APPENDIX D

U. S. Department of Labor

Mine Safety and Health Administration
4015 Wilson Boulevard
Arlington, Virginia 22203

JUL 29 1982

Henry Chajet, Esq.
Senior Counsel
American Mining Congress
Suite 300
1920 N St., NW
Washington, D.C. 20036

Dear Mr. Chajet:

This is in response to your request for a letter containing the latest final annual statistics readily available to the public on regular and other inspections of coal and metal/nonmetal mines.

During calendar year 1980, MSHA's Coal Mine Safety and Health activity conducted 15,148 complete regular inspections, and 78,911 other inspections, at U.S. coal mines. These statistics are derived from tables appended to the testimony of Assistant Secretary for Mine Safety and Health Ford B. Ford before the Subcommittee on Manpower and Housing, Committee on Government Operations, House of Representatives, February 19, 1982.

During fiscal year 1980 (October 1, 1979 through September 30, 1980), MSHA's Metal and Nonmetal Mine Safety and Health activity conducted 22,555 regular inspections and 9,453 compliance followup inspections. These statistics are from MSHA's FY 1980 annual report, which is not yet published but which has been cleared for transmittal by the President to Congress; statistics in this report have been made available to members of the public upon request.

Sincerely,

Samuel A. Stafford (for)

Wayne E. Veneman
Chief, Office of Information

MOTION FILED

AUG 11 1982

No. 82-33

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, AND
KENTLAND-ELKHORN COAL CORPORATION,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

and

UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL COMPANY, CENTRAL OHIO COAL COMPANY, PRICE RIVER COAL COMPANY, SOUTHERN APPALACHIAN COAL COMPANY, SOUTHERN OHIO COAL COMPANY, AND WINDSOR POWER HOUSE COAL COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Alvin J. McKenna, Counsel of Record
David A. Morton, of Counsel
D. Michael Miller, Of Counsel
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No. 82-33

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

THE HELEN MINING COMPANY, AND
KENTLAND-ELKHORN COAL CORPORATION,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
and
UNITED MINE WORKERS OF AMERICA,
Respondents.

---

**On Petition For A Writ of Certiorari To The United States Court of Appeals for The District of Columbia Circuit**

---

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company, move the Court, pursuant to Rules 36 and 42 of the Rules of the Supreme Court of the United States, for leave to file the accompanying Brief *Amici Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed with this Court on July 8, 1982, by Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, and to be allowed to appear in the matter as *amici curiae* if certorari is granted. Petitioners, Helen Mining Company and Kentland-Elkhorn Coal Corporation, have consented to the filing. Likewise, Respondent, Secretary of Labor, through the Solicitor General of the United States, has consented to the filing; but the other

Respondent, United Mine Workers, of America, has refused to consent.[1]

## NATURE OF THE INTEREST OF PROPOSED AMICI AND REASONS LEAVE FOR SUCH FILING IS DESIRABLE

Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company [hereinafter referred to collectively as "AEP Companies"] are subsidiary corporations wholly owned by utility companies, in turn, owned by American Electric Power Company, Inc., a public utility holding company,[2] and operate approximately thirty underground and surface coal mines throughout the United States. Affiliated companies in the American Electric Power Company System service nearly two and one-half million residential and industrial utility customers in a seven state region and also are interconnected with other utility companies which provide electric power to customers in the eastern United States. The AEP Companies as a group constitute one of the largest coal producers in the United States, and the American Electric Power System is the largest user of coal in the United States. Because of this very substantial involvement in the production of coal, and the intensive use of coal by their various affiliated companies, the AEP Companies are vitally interested in the issues to be decided by the Court in this proceeding.

The Helen Mining Company and Kentland-Elkhorn Coal Corporation's Petition for a Writ of Certiorari seeks review, pursuant to this Court's jurisdiction under 28 U.S.C. § 1245(1), of the split panel decision of the District of Columbia Circuit Court of Appeals in *United Mine Workers of America* v.

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[1] The consent of Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, and of the Solicitor General of the United States on behalf of the Respondent, Secretary of Labor, appear as Appendices A and B, respectively.

[2] The listing of parent and affiliated corporations, as required by Rule 28.1 to be included in this Motion, is set forth in Appendix C.

*Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) ["Decision"]. That Decision interpreted a provision of the Federal Mine Safety and Health Act of 1977 [the "Act"], 30 U.S.C. § 801 *et seq.* – specifically, § 103(f) [30 U.S.C. § 813(f)] – as entitling miners' representatives to payment of their regular wages for the time they spend accompanying inspectors of the Secretary of Labor, Mine Safety and Health Administration ["MSHA"] during so-called "spot inspections" in addition to the payments received for time accompanying MSHA Inspectors during "regular inspections."[3]

Since the Decision, MSHA has initiated enforcement of that single judicial interpretation of § 103(f).[4] MSHA's enforcement activities have resulted in numerous citations being issued under § 104 of the Act [30 U.S.C. § 814] and the threatened issuance of withdrawal orders under that same provision. The AEP Companies have received several such citations under § 104(a) of the Act and threats of the issuance of withdrawal orders. Three of those citations are currently being contested by three of the AEP Companies related to mines located in the Fourth, Sixth, and Tenth Judicial Circuits.

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[3] The term "spot inspection" now has the accepted meaning – among MSHA and non-governmental personnel in the mining industry – of an inspection other than the four inspections of the entire mine facility required by § 103(a) of the Act [30 U.S.C. § 813(a)] to be conducted each year in underground mines. The particular types of "spot inspections" at issue in the consolidated cases below were "spot inspections" under § 103(i) [30 U.S.C. § 813(i)], with respect to Helen Mining and Allied Chemical, and a "specialized electrical inspection," regarding Kentland-Elkhorn. The Act also specifically provides for other "spot inspections." See, *e.g.*, § 103(g)(1) [30 U.S.C. § 813(g)(1)], § 202(g) [30 U.S.C. § 842(g)], and § 303(x) [30 U.S.C. § 863(x)]. The label "regular inspections" – which at the AEP Companies' mines typically are conducted nearly every working day over each three month calendar period – has been attached to the statutorily-mandated, four inspections each year of the entire mine facility under § 103(a). See, *e.g.*, MSHA's *Coal Mine Health and Safety Manual* (1978) at pp. I-113 to I-125, which appears as Appendix D.

[4] The MHSA directive for enforcement of that Decision throughout the mining industry is set out in Appendix E.

Federal Mine Safety and Health Review Commission Docket Nos. WEST 82-166-R; LAKE 82-76-R; WEVA 82-243-R.[5]

MSHA's actions based upon this Decision have placed a substantial economic and operational burden upon the AEP Companies – and the mining industry generally – which exceeds that envisioned or intended by Congress in its enactment of this statute. Thus, the involvement of the AEP Companies as *Amici* will serve to appropriately demonstrate that the issues presented in the Decision as to which review is sought involve more than a discrete set of facts in a particular case and are not "academic" or "episodic" problems. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 233, 225 n.2 (1975); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1954).

Until a final and proper resolution of the issues presented herein is reached, the AEP Companies and the entire mining industry are confronted with the dilemmatic choice of:

(1) bearing the burden and injury of making payments to representatives of miners under the compulsion of what the AEP Companies believe to be an improper application of the law with a substantial cloud on the likelihood of recouping such payments [*see, CF&I Steel Corp.* v. *Morton*, 516 F.2d 868 (10th Cir. 1975); *GEX Colorado, Inc.*, 2 FMSHRC Decisions 3503 (1980) and 2 FMSHRC Decisions 3494 (1980)]; or

(2) subjecting themselves to the repeated issuance of citations or withdrawal orders under § 104 of the Act, thereby creating violation histories, which in turn, magnify the penalties in other matters [30 U.S.C. §§ 815(b), 820(i); 30 C.F.R. § 100.3(a) and (c)]; or

---

[5] Additionally, one of the AEP Companies had prevailed on the pay entitlement question before the Federal Mine Safety and Health Review Commission [*Southern Ohio Coal Co.*, 4 FMSHRC Decisions 72 (1982)], and the Secretary of Labor had sought review before the District of Columbia Circuit. Following its Decision below, however, the Circuit Court remanded that case to the Commission for further proceedings. D. C. Circuit Case No. 81-2299, April 27, 1982.

(3) incurring further expenses in defending against the same improper application of the law while at the same time having to pay to abate citations rather than being subjected to withdrawal orders [30 U.S.C. § 814].

This is a hardship which the AEP Companies, in particular – and the mining industry, generally – have suffered and will suffer further due to MSHA's continued application of this erroneous Decision; and the impact of this Decision reaches far beyond merely the tpyical facts and individual Petitioners involved here. These important questions of federal law are matters of substantial and nationwide importance as to which this Court's resolution is both appropriate and necessary, and as to which the AEP Companies can provide a vantage point in addition to that already brought to the proceeding by the Petitioners.

For all of the foregoing reasons, the AEP Companies submit that they should be granted leave to file their accompanying Brief *Amici Curiae* and leave to appear in this proceeding as *Amici Curiae* if certiorari is granted.

Respectfully submitted,

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No. 82-33

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE HELEN MINING COMPANY, and
KENTLAND-ELKHORN COAL CORPORATION,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

and

UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

## BRIEF AMICI CURIAE OF CEDAR COAL COMPANY, CENTRAL APPALACHIAN COAL COMPANY, CENTRAL OHIO COAL COMPANY, PRICE RIVER COAL COMPANY, SOUTHERN APPALACHIAN COAL COMPANY, SOUTHERN OHIO COAL COMPANY, AND WINDSOR POWER HOUSE COAL COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

### I. INTEREST OF AMICI.

Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company,

Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company [hereinafter collectively referred to as "AEP Companies"] are wholly owned subsidiary corporations of utility companies, in turn, owned by American Electric Power, Inc., a public utility holding company. The AEP Companies operate coal mines throughout the United States and, together, constitute one of this country's largest coal producers. Companies in the American Electric Power System provide electric service to nearly two and one-half million residential and industrial utility customers and, as a group, form the largest user of coal in the country. Because of this strategic involvement in the production and use of this nation's coal, the AEP Companies are acutely concerned with the determination of the issues before the Court in this proceeding. During the past decade, the AEP Companies have been at the forefront of matters involving the application and interpretation of federal and state mine safety laws in matters such as responding to public requests of the Secretary of Labor, Mine Safety and Health Administration ["MHSA"] and the Federal Mine Safety and Health Review Commission ["Commission"] for input which has been incorporated in the drafting of procedural rules used by both and in the development of decisional law in the mine safety field.

On April 25, 1978, MSHA had issued an Interpretive Bulletin which, among other matters, interpreted §§ 103(a) and 103(f) [30 U.S.C. §§ 813(a) and 813(f)] of the Federal Mine Safety and Health Act of 1977 [the "Act"], 30 U.S.C. § 801 *et seq.*, as entitling miners' representatives to their regular compensation for "spot" as well as "regular inspections." 43 Fed. Reg. 17546 (April 25, 1978). Because of the Commission's role as an expert adjudicative body charged with reviewing MSHA's enforcement practices under the Act, Judge Gessel of the District Court for the District of Columbia dismissed a judicial challenge to MSHA's Interpretative Bulletin, primarily in order to permit the Commission to exercise its

expertise in resolving the issue before any judicial review. *Bituminous Coal Operators' Ass'n., Inc.* v. *Marshall*, 82 F.R.D. 350 (D.D.C. 1979).

Following this deferential treatment by Judge Gessel, all of the Commission's decisions regarding these statutory provisions uniformly held that MSHA's attempted interpretation was unsupported by the legislative history of the Act and erroneous as a matter of law. *Helen Mining Co.*, 1 FMSHRC Decisions 1796 (1979); *Kentland-Elkhorn Corp.*, 1 FMSHRC Decisions 1833 (1979); *Allied Chemical Corp.*, 1 FMSHRC Decisions 1947 (1979). And, based upon those rulings, summary decision, pursuant to 29 C.F.R. § 2700.64, was granted in several cases presenting this same issue. See, *e.g.*, *Southern Ohio Coal Co.*, 4 FMSHRC Decisions 72 (1982); *Island Creek Coal Co.*, 2 FMSHRC Decisions 1983 (1980); *Alabama By-Products Corp.*, 2 FMSHRC Decisions 467 (1980); *Princess Susan Coal Co.*, 2 FMSHRC Decisions 69 (1980).

Following the split panel decision below in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) ["*UMWA* v. *FMSHRC*"], which held that miners' representatives have a right to be compensated for the time spent accompanying MSHA Inspectors during "spot inspections," as well as "regular inspections,"[1] MSHA resurrected its prior interpretative policy [Appendix E]. MSHA's enforcement of this unique interpretation of § 103(f) has resulted in the imposition against mine operators throughout the country of countless citations under § 104 of the Act [30 U.S.C. § 814] and the threat of imposition of withdrawal orders under that same section.

MSHA has issued several such citations against the AEP Companies and threatened the issuance of withdrawal orders. Three of those citations, related to mines located in the Fourth, Sixth, and Tenth Circuits, are being contested before the

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[1] See Motion for Leave to File Brief *Amici Curiae*, footnote 3.

Commisison.[2] Prior to *UMWA* v. *FMSHRC*, the Secretary of Labor had sought review in the District of Columbia Circuit of a Commission decision in which one of the AEP Companies had prevailed on the issue of "spot inspection" pay entitlement.[3] After *UMWA* v. *FMSHRC*, that case was remanded to the Commission.[4]

## II. SUMMARY OF ARGUMENT

The issues presented by the Petition for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982), concern important questions of federal law involving the interpretation and application of a relatively new statute – the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* – which is national in scope. And, those issues relate both to concerns typified by the particular circumstances here and to matters involving substantial sums of money.

In blatant disregard of the repeated directions of this Court, the split panel majority failed to avail itself of clear and conclusive legislative history and failed to consider other relevant provisions of the Federal Mine Safety and Health Act of 1977 in determining the interpretation and application of the particular portion of the statute involved – 30 U.S.C. § 813(f).

Additionally, that majority's decision refused to grant any deference to the determination of the Federal Mine Safety and Health Review Commission and ignored the role envisiond and designed for that Commission by Congress under the statute. Thus, the decision further conflicts with decisions of

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[2] Commission Docket Nos. WEST 82-166-R [*Price River Coal Co.*], LAKE 82-76-R [*Southern Ohio Coal Co.*], and WEVA 82-243-R [*Windsor Power House Coal Co.*].

[3] *Southern Ohio Coal Co.*, 4 FMSHRC Decisions 72 (1982).

[4] D.C. Circuit Case No. 81-2299, April 27, 1982.

this Court and conflicts with those of the Third, Fourth, and Eighth Judicial Circuits.

## III. REASONS FOR GRANTING THE WRIT

Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, have presented two important questions for review by this Court:

> 1. Whether the court of appeals' decision ignoring clear, authoritative, and dispositive legislative history in the face of an ambiguous statute was contrary to this Court's numerous holdings that legislative history is always relevant to discerning the meaning of a statute.
>
> 2. Whether the court of appeals erred in refusing to grant any deference to the decision of the Federal Mine Safety and Health Review Commission, the expert agency Congress created to interpret the Mine Act.
>
> Petition for Writ of Certiorari at p. iii.

The AEP Companies support Petitioners' position on each of these issues.

This Court has recognized repeatedly that its authority to review decisions of other courts under its jurisdiction to grant a writ of certiorari, 28 U.S.C. § 1254, should be exercised in cases involving "seemingly important questions of federal law." *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394, 399 (1974). Through the years, the important circumstances warranting the exercise of that authority have included: determining the effect of a section of the Longshoremen's and Harbor Workers' Act because of its national scope and a decision respecting its enforcement provided a precedent of general application [*Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935)]; determining whether a reviewing court had invaded the statutorily conferred duties of an administrative agency so that those duties could not be fulfilled [*NLRB* v. *Waterman Steamship Corp.*, 309 U.S. 206 (1940)];

determining an individual case which is typical of a problem important and general enough to warrant the attention of the Court's supervisory power [*Stack* v. *Boyle*, 342 U.S. 1, 13 (1951) (Separate Opinion of Mr. Justices Jackson and Frankfurter)]; construing a statute of nationwide importance – which is "among the most important issues for final determination of this Court" [*Kernan* v. *American Dredging Co.*, 355 U.S. 426, 441 (1958) (Memorandum of Mr. Justice Frankfurter)]; reviewing a decision which was treated as precedential in the consideration of matters involving substantial sums of money [*United States* v. *Chicago, Burlington & Quincy R.R. Co.*, 412 U.S. 401, 404 (1973)]; resolving "a seemingly important issue involving the construction of . . . [a] relatively new federal statute" [*United States* v. *Kahn*, 415 U.S. 143, 150 (1974)]; and reviewing a split panel decision of the District of Columbia Circuit setting aside the ruling of a federal commission when the validity of that ruling is of obvious importance [*FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974)].

This myriad of important circumstances warranting the granting of certiorari all meld in the present situation as to which review is sought.

MSHA's enforcement activities, predicated on *UMWA* v. *FMSHRC*, have worked a substantial financial and operational burden – clearly exceeding that envisioned and intended by Congress at the time it passed the Act – not only upon Petitioners, but also upon the AEP Companies and the nation's mining industry, generally.

Unless and until a proper and final determination regarding the questions herein presented is reached by this Court, the AEP Companies and the nation's mining industry will continue to be confronted with an irreconcilable dilemma. They must: either make payments to miners' representatives under the compulsion of an improper application of the law under circumstances in which recovery of those funds is questionable [*see, CF&I Steel Corp* v. *Morton*, 516 F.2d 868 (10th Cir. 1975); *GEX Colorado, Inc.*, 2 FMSHRC Decisions 3503

(1980) and 2 FMSHRC Decisions 3494 (1980)]; or subject themselves to the repeated issuance of citations or withdrawal orders under § 104 of the Act, thereby creating violation histories which consequently magnify the amounts of penalties in other matters [30 U.S.C. §§ 815(b), 820(i); 30 C.F.R. §§ 100.3 (a) and (c)]; or incur additional expenses in defending against that improper application of the law while having to pay to abate citations to avoid the imposition of withdrawal orders [30 U.S.C. § 814].

The impact of this erroneous split panel decision of the District of Columbia Circuit, regarding the interpretation of a novel statute of nationwide importance, clearly reaches far beyond merely the Petitioners. *Teleprompter, supra; Del Vecchio, supra; Kernan, supra; Kahn, supra; Texaco, supra.* Moreover, it is equally evident, as discussed below, that the possibility of divergence among the various Judicial Circuits regarding the questions of interpretation and the proper function of a reviewing court is quite real. *Waterman, supra; Stack, supra.* And, review by this Court now can ensure appropriate uniformity of the proper application of the law throughout the nation without relegating the mining industry to the position of bearing weighty operational and financial burdens while awaiting the development of a conflict among the Circuits on the specific interpretation of this statute. *Del Vecchio, supra; Kernan, supra; Chicago, Burlington & Quincy, supra.* Therefore, the requested Writ should issue to review these substantial and acutely important questions of federal law.

### 1. The Court of Appeals' Decision Directly and Irreconcilably Conflicts With the Repeated and Explicit Directions of This Court.

In reaching its Decision, the split panel majority conceded that "the scope of a miners' representative's right to participate in mine inspections, and his right to do so without loss of pay, are governed *exclusively* by subsections (a) and (f) of section

103 of the Act." *UMWA* v. *FMSHRC*, 671 F.2d at 619 [Emphasis Supplied].[8]

That majority – in an opinion written by District Judge Greene, to which Circuit Judge Wald filed a concurring opinion and Circuit Judge Tamm filed a vigorous dissenting opinion – further conceded that the phrase "pursuant to the provision of subsection (a)" in § 103(f) of the Act "may well be ambiguous." 671 F.2d at 621. Yet, it ruled that the Commission erred in even considering legislative history – specifically the statements of Congressman Carl Perkins which form clear, relevant, and the *only* direct legislative history available regarding the provisions of § 103(f) concerning entitlement to pay for participation in "spot inspections." *Id.* at 622.

Representative Perkins' specific and unambiguous statements, in connection with the Conference Substitute Bill which became the present Act, regarding the pertinent operation of § 103(f), were:

> Mr. Speaker, before concluding my remarks I would like to address one aspect of the conference report that seems to be somewhat ambiguous.
>
> Section 103(a) of the conference report provides that
>
> . . .
>
> [i]n carrying out the requirements of clauses (3) and (4) – concerning imminent dangers or compliance with standards – the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year and of each surface coal or other mine in its entirety at least two times a year.
>
> In addition to the regular inspections of each mine in its entirety as specified in section 103(a), section 103(g)(1) provides that whenever a representative of

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[8] Sections 103(a) and 103(f) appear as Appendices F and G, respectively.

a miner, or a miner at a mine where there is no such representative, has reasonable grounds to believe that a violation or imminent danger exists, such representative or miner shall have a right to obtain an immediate inspection. Further section 103(i) provides for additional inspections for any mine which liberates excessive quantities of methane or other explosive gases, or where a methane or gas ignition has resulted in death or serious injury, or there exists some other especially hazardous condition.

Section 103(f) provides that a miners' representative authorized by the operator's miners shall be given an opportunity to accompany the inspector during the physical inspection and pre- and post-inspection conferences pursuant to the provisions of subsection (a). Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and *not* to those pursuant to section 103(g) or 103(i), *the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector*, including pre- and post-[inspection] conferences, *at no loss of pay only during the four regular inspections of each underground mine* and two regular inspections of each surface mine *in its entirety* including pre- and post-inspection conferences.

• • •

Section 103(h) of the 1969 act provided generally that —

At the commencement of *any inspection* . . . the authorized representative of the miners at the mine . . . shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Since the conference report does *not* refer to *any inspection*, as did section 103(h) of the 1969 act, but, rather to an inspection of any mine *pursuant* to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay *only* for the regular inspections mandated by subsection (a),

and *not* for the additional inspections otherwise required or permitted by the act. [Emphasis supplied.]

> 123 Cong. Rec. 35410 (1977), *reprinted in Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977* at 1356-58 (1978). ["Legis. Hist."]

At the time of the delivery of the typically influential Report of the Congressional Conference Committee to the House of Representatives, Congressman Perkins was widely known and respected as one of the foremost proponents of improved federal mine safety laws, the chief sponsor of the House version of the 1977 revisions to the federal mining laws, chairman of the Joint Conference Committee, and Chief House Conferee, in addition to his role as one of the primary movers in the enactment of the Federal Coal Mine Safety Act of 1969 – the predecessor to the present Act. *UMWA* v. *FMSHRC*, 671 F.2d at 620, 634-35.

The key focus of the varying opinions regarding entitlement to compensation during "spot inspections" essentially has been on an interpretation of whether "spot inspections" are "made pursuant to the provisions of subsection (a)" of § 103, as required by § 103(f). Congressman Perkins' statements – ignored by the Court of Appeals majority – clearly resolve that issue in the negative.

In ascertaining the limits which Congress intended to place on the miners' representative's right to be compensated for walkaround activities during a "spot inspection," it was incumbent upon the Court of Appeals to heed this Court's direction that "care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy." *United States* v. *Sisson*, 399 U.S. 267, 298 (1970). The pursuit of this objective, even in the face of no ambiguity in a statute, properly involves a consideration of "other parts of the Act and legislative history" to avoid defeating the intent of the legislative body. *Helvering* v. *New York Trust Co.*, 292 U.S.

455, 464 (1934). *See also, Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972).

As earlier held by this Court,

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.
>
> *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928).

Consonantly, this Court has uniformly concluded that the meaning to be ascribed to a statute can only be derived from a considered weighing of *every* relevant aid to construction. *United States* v. *Dickerson*, 310 U.S. 554 (1940); *accord*, Chief Justice Marshall's statement in *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1804) "where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived"; *see also, Cass* v. *United States*, 417 U.S. 72, 78-79 (1974); *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1942).

Consistent with that developed principle, this Court has stated more recently that:

> As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-544 (1940) (footnotes omitted). See *Cass* v. *United States*, 417 U.S. 72, 77-79 (1974). See generally Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Col. L. Rev. 1299 (1975).
>
> *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1, 10 (1976).

In the present case — setting aside the demonstration of

the meaning of § 103(f) which is apparent in the logic and language of the particular section itself, the language of other sections of the Act, and that of other interrelated statutes – the Court of Appeals majority inexplicably and incorrectly chose to ignore the very persuasive evidence available in the Act's legislative history. By failing to avail itself of the presentation by Representative Perkins – one who was intimately involved in the final formulation of the language of the Act and whose uncontradicted remarks clearly and specifically answered the central issue presented in this case – the majority below is in direct conflict with this Court's repeated holdings.

The contention that the general, remedial purpose of the Act mandates a rejection of the Congressionally intended limitation clearly articulated in Congressman Perkins' remarks does not suffice to reduce its proper impact.[6] This Court has stated directly that "care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy," *United States* v. *Sisson*, 399 U.S. at 298, and that no court is free to ignore statutory limitations merely because it finds they are "unsuited to achieving the general purpose in a particular case," *Commissioner* v. *Gordon*, 391 U.S. 83, 93 (1968). Thus, to interpose the generalized purpose of the Act in an attempt to defeat the execution of the clear Congressional intent regarding a specific section – as enunciated by one who considered, discussed, and represented the views of those who prepared the final legislative package –

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[6] Any attempt to shroud the Decision below under the protective cloak of application of the axiom of statutory construction of utilizing the most liberal interpretation of remedial legislation is, in the circumstances of this case, unavailing as further conflicting with the decisions of this Court:

> "[a] canon of construction is not a license to disregard clear expressions of congressional intent." *DeCotrau* v. *District County Court*, 420 U.S. 425, 447 (1975).
>
> *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 619 (1980).

> impermissibly crosses the line that divides construction of a statute to effectuate the will of Congress from construction intended to achieve the preferable policy conclusion.
>
> *UMWA* v. *FMSHRC*, 671 F.2d at 627.

Moreover, if – as was assumed by the majority below as the pivotal basis for its Decision – the Congressional intent was to provide as broad as possible miner participation commingled with pay for participation in all inspections, the statutory limitation to pay for a single representative (although participation by others may be necessary and allowed) and the limitation to "no loss in pay" (rather than a direction to pay) [*UMWA* v. *North American Coal Corp.*, 3 FMSHRC Decisions 1428 (1981)] would be incongruous.

As discussed above, clarity or lack of ambiguity[7] does not prevent resort to construction guidance from the legislative history of the Act. Moreover, the issue of the meaning of § 103(f) has been resolved discordantly by a number of judicial officers. On the one hand, several Administrative Law Judges of the Commission, three members of the Commission, and a Judge of a United States Court of Appeals have concluded that § 103(f) gives a narrow right of pay entitlement; and on the other hand, one Administrative Law Judge of the Commission, two members of the Commission, a United States District Judge, and a Judge of a United States Court of Appeals have concluded – for differing reasons – that the right is broader. That situation, in and of itself, aptly manifests the ambiguity of the statute warranting resort to the clear language of a proponent of the legislation who was representing the intention of

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[7] Somewhat contradictorily, the majority in *UMWA* v. *FMSHRC* concluded that the statute was clear and unambiguous when finding error in the Commission's consideration of Congressman Perkins' remarks, 671 F.2d at 620-623, but elsewhere found the statute "subject to three interpretations," *id.* at 619, "may well be ambiguous," *id.* at 621, and "not wholly unambiguous," *id.* at 623.

the Conference Committee members of both chambers of Congress in offering the legislation.

It is worthy of emphasis to note that Congressman Perkins' remarks were not made by an uninvolved legislator or one who, as a matter of legislative subterfuge, attempted to "load up" the legislative history with self-serving statements after failing to achieve an end, as was implicitly suggested by the majority in *UMWA* v. *FMSHRC*, 671 F.2d at 622-623. Rather, these were the remarks of a deeply involved legislator who had participated intimately in the final preparation of the bill which became law and who has an undeniable record of advancing and supporting legislation augmenting the rights of persons employed in mines. *See*, 2A *Sutherland on Statutory Construction* § 48.14 at 220 (4th ed. 1973).

Apart from the dispositive legislative history of the Act, support for the conclusion that only "regular inspections" – and *not* "spot inspections" – are made "pursuant to the provisions of" § 103(a) has been found in "the logic of the language of subsection 103(a) itself" and the language and relationship of other sections of the Act. *See, e.g., UMWA* v. *FMSHRC*, 671 F.2d at 630-631; *Helen Mining Co.*, 1 FMSHRC Decisions 1796, 1802 (1979).

Summarily stated, those bases of support demonstrate that: 1) a contrary construction of "pursuant to" – under which both "regular inspections" and "spot inspections" are found to be authorized by § 103(a) – destroys any substantive meaning for that phrase; 2) authorizations for "spot inspections" exist in other sections of the Act – *e.g.*, §§ 103(g) and (i); and 3) construing the phrase "pursuant to" as a circumscription of the "regular inspections" specifically mandated by § 103(a) gives play to the Congressional forbearance from use of the term "any inspection" in § 103(f) as Congress simultaneously used it in at least six other related portions of the Act – § 103(a); § 103(g)(2) [30 U.S.C. § 813(g)(2)]; § 104(d)(1) [30 U.S.C. § 814(d)(1)]; § 104(e)(1) [30 U.S.C. § 814(e)(1)]; § 104(g)(1) [30 U.S.C. § 814(g)(1)]; and § 107(a) [30 U.S.C. § 817(a)]. *Ibid.*

Drawing support from those bases is a fundamental application of certain axiomatic principles of statutory construction adhered to by this Court – *e.g.*, the primary function in statutory construction is to ascertain and declare the intention of the legislature [*United States* v. *Cooper Corp.*, 312 U.S. 600 (1941)]; in interpreting a statute, care must be taken so as to give effect to the statute as a whole [*United States* v. *Menasche*, 348 U.S. 528, 538-539 (1954); *United States* v. *Campos-Serano*, 404 U.S. 293, 301, n.14 (1971)]; an interpretation should be avoided, whereby the statute or provision being construed is defeated or rendered insignificant or meaningless [*ibid.*]; and significance and effect should be accorded every part of a statute, including every clause [*United States* v. *Fisher*, 109 U.S. 143 (1883)]. However, the majority below ignored each of these principles from this Court's decisions.

In addition to its other errors of interpretation, its lack of consideration of other pertinent provisions of the Act, and its ultimate conclusion, "to the extent that the Court of Appeals excluded reference to the legislative history [of the Act] . . . in discerning its meaning, the court was in error," *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. at 9-10. Therefore, its Decision should be reviewed on certiorari and reversed.

**2. By Concluding that the Commission's Prior Decisions Were Entitled to No Deference, this Decision Conflicts With the Decisions of this Court, Creates a Conflict Among the Circuits, and Ignores the Congressional Scheme that Established the Commission as the Ultimate Administrative Review Body for the Purpose of Developing a Uniform and Comprehensive Interpretation of the Act.**

Beyond its failing to heed the only available relevant legislative history which unequivocally demonstrated Congress' intent with respect to its enactment of § 103(f) of the Act, the Court of Appeals majority erroneously concluded that the Commission's decision was entitled to "no deference." *UMWA*

v. *FMSHRC*, 671 F.2d at 623, n. 26. In examining this error warranting review, it is helpful to examine the history of the Commission, the purpose for which it was established, and the reasons the majority below should have found the Commission's well-reasoned construction of § 103(f) to be entitled to great deference rather than absolutely none.

The history and design of the Commission, and the purpose for which it was established was concisely summarized in *Helen Mining Co.*, 1 FMSHRC Decisions 1796 (1979). There, the Commission noted that the arrangement formerly existing under the Federal Coal Mine Safety and Health Act of 1969 was among the alternatives considered and rejected by the Senate Committee which drafted the bill from which the ultimate establishment of an independent Commission evolved. Under the 1969 statute, standard setting, investigation, prosecution, and adjudication responsibilities were all combined in the Secretary of the Interior. *Id.* at 1799.

> The Senate committee followed instead the example that Congress had set under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. That statute established the Occupational Safety and Health Review Commission, which has been recognized as an independent agency with a law- and policy-making role. . . . The Senate committee bill thus established this Commission under the 1977 Act as an independent agency with an express policy role. Senator [Harrison] Williams, the chief architect of the Senate bill, confirmed the important role of the new Commission, when, while introducing the Senate bill, he stated to the Senate that under the bill "[t]he procedure for determining operator responsibility and liability is assigned to a truly independent . . . Commission . . ." 1977 Legis. Hist. at 89. [Footnotes omitted.]
>
> *Id.* at 1799-1800.

The Court of Appeals majority's conclusion – that the Commission's decision on pay entitlement was entitled to "no de-

ference" – as well as being clearly erroneous,[8] is in direct conflict with decisions of this Court on the deference to be given to statutory construction by the responsible administrative agency and prior holdings of a number of other Circuits regarding the proper deference to be shown to the Commission's sister agency – the Occupational Safety and Health Review Commission ["OSHRC"] – whose organizational structure and authority served as the models for those of the Commission.

Through the years, this Court has determined that deference is to be accorded statutory interpretations of the agency responsible for the administration of a statute and that the courts are not to intrude on that agency authority simply on the basis that it has another view of the meaning of a statute. When confronting a case of review of the statutory construction given by the administrative body ultimately charged with such interpretive authority, this Court has concluded that to uphold the administrative body's interpretation,

> "'. . . we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" *Udall* v. *Tallman*, 380 U.S. 1, 16, (1965), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946).

Moreover an administrative "practice has peculiar weight when it involves a contemporaneous construction of the statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); see, e.g., *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1969).

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[8] The error of this conclusion is particularly striking when the panel majority then proceeded to accord a great amount of deference to the Secretary's interpretation in MSHA's Interpretative Bulletin, 43 Fed. Reg. 17546 (April 25, 1978). *UMWA* v. *FMSHRC*, 671 F.2d at 626.

> The question is thus whether, in light of the normal aids to statutory construction, the . . . interpretation is "sufficiently reasonable" to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council* . . .
>
> *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978).

Also directly related to the particular circumstances of the present case – and in pointed conflict with the decision below – are the decisions of various Circuits related to the substantially identical circumstances involving the review of OSHRC rulings. In those instances, it has been concluded that courts should defer to OSHRC decisions, *even when* those decisions differ from the interpretation of the Secretary. *Bratton Corp.* v. *Occupational Safety and Health Review Commission*, 590 F.2d 273, 276 (8th Cir. 1979); *Diebold, Inc.* v. *Marshall*, 585 F.2d 1327, 1332 (6th Cir. 1978); *Marshall* v. *Knutson Construction Co.*, 566 F.2d 596, 600 (8th Cir. 1977); *Dunlop* v. *Rockwell International*, 540 F.2d 1283, 1289-1290 (6th Cir. 1976); *Budd Co.* v. *Occupational Safety and Health Review Commission*, 513 F.2d 201, 204-05 (3d Cir. 1975); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-1262 (4th Cir. 1974).

In *Gilles & Cotting*, the court aptly stated the grounds for such deference and was influenced appropriately by the facts that "Congress deliberately created the Commission separate and independent of the Secretary" and "the statute vests adjudicatory functions in the Commission." *Id.* at 1262. The court concluded that "the Commission [OSHRC] was designed to have a policy role and its discretion therefore includes some questions of law . . ." Otherwise, the court reasoned, the OSHRC would be "little more than a specialized jury, an agency charged only with fact finding." *Ibid.*

The Commission here, like the OSHRC, was Congressionally created to be separate and independent of the Secretary and is an adjudicative body vested by statute with the authority to make independent resolutions of questions of policy and statutory construction. It does not have merely a

"rubber stamp" function regarding the Secretary's practices and interpretations, and its decisions are worthy of some deference. The decision below subverts the authority Congress granted to the Commission.

Without intending to be presumptuous in predicting the results of deliberations of the judiciary, it is reasonable to conclude that the cases from the other Circuits suggest that those Courts would resolve the issues which were before the District of Columbia Circuit in this proceeding in a manner which conflicts with the decision below. The public interest will not be appropriately served by relegating the nation's mining industry to awaiting the several years for the development of a conflict of interpretation on the specific statute and on the typical facts present here, while bearing the substantial operational and financial burden, before appropriate judicial direction is given by this Court.

In this proceeding, the majority below not only refused to accord "great deference" to the statutory construction rendered by the Commission – in conflict with the decisions of this Court and of other Circuits – but also *refused* to accord *any deference* whatsoever to that construction. And, those refusals were predicated on the plain, but impermissible, basis of interposing the panel majority's own view of what the statute should provide – while admittedly ignoring the clear and unambiguous statements of Congressional intent as to the limits of the pay entitlement provisions of § 103(f) of the Act and the authority and responsibility of the Commission as expressed in the legislative history of the Act. Such judicial action warrants review on certiorari and reversal.

## IV. CONCLUSION

For the foregoing reasons and those contained in the Petition for a Writ of Certiorari, it is respectfully submitted that a Writ of Certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit and the Court of Appeals' decision should be reversed.

Respectfully submitted,

Alvin J. McKenna, Counsel of Record
David A. Morton, Of Counsel
D. Michael Miller, Of Counsel
ALEXANDER, EBINGER, FISHER,
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Attorneys for Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company

## APPENDIX


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## APPENDIX A

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[LETTERHEAD OF CROWELL & MORING]

July 26, 1982

Mr. Alvin J. McKenna
Alexander, Ebinger, Fisher,
McAlister & Lawrence
11th Floor, Huntington Bank
Building
17 South High Street
Columbus, Ohio 43215

Re: The Helen Mining Company, et al v. Donovan, No. 82-33

Dear Al:

This will confirm that Petitioners, The Helen Mining Company and Kentland-Elkhorn Coal Corporation, have no objection to your filing an *amici curiae* brief in support of the petition for certiorari in this case.

Sincerely,

/s/ RICHARD McMILLAN, JR.
Richard McMillan, Jr.

## APPENDIX B

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[LETTERHEAD OF U.S. DEPARTMENT OF JUSTICE]
(Seal) Office of the Solicitor General

July 9, 1982

Alvin J. McKenna, Esquire
Alexander, Ebinger, Fisher, McAlister & Lawrence
11th Floor, Huntington Bank Building
17 South High Street
Columbus, Ohio 43215

Re: *Helen Mining Company and Kentland-Elkhorn Coal Corporation* v. *Federal Mine Safety and Health Review Commission, et al.*, 671 F.2d 615 (D. C. Cir. 1982).

Dear Mr. McKenna:

In response to your letter of July 7, 1982, I hereby consent, on behalf of the federal respondent, to the filing of a brief *amicus curiae* on behalf of the subsidiary corporations of American Electric Power Company in this case.

Sincerely,

/s/ REX E. LEE
Rex E. Lee
Solicitor General

# APPENDIX C

## PARENT AND AFFILIATES OF PROPOSED AMICI CURIAE

The following is provided in compliance with Supreme Court Rule 28.1. As noted in their Motion for Leave to File Brief *Amici Curiae*, Cedar Coal Company, Central Appalachian Coal Company, Central Ohio Coal Company, Price River Coal Company, Southern Appalachian Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company are wholly owned subsidiaries of utility companies which are owned, in turn, by American Electric Power Company, Inc., a public utility holding company. The companies in the American Electric Power Company System which could be considered affiliates of the proposed *Amici Curiae* are:

- American Electric Power Service Corporation
- AEP Energy Services, Inc.
- AEP Generating Company
- Appalachian Power Company which, in addition to Cedar Coal Company, Central Appalachian Coal Company, and Southern Appalachian Coal Company, owns:
  - Central Coal Company (partially)
  - Central Operating Company (partially)
  - Kanawha Valley Power Company
  - West Virginia Power Company
- Columbus and Southern Ohio Electric Company which owns:
  - Colomet, Inc.
  - Simco, Inc.
- Franklin Real Estate Company which owns:
  - Indiana Franklin Realty, Inc.

- Indiana and Michigan Electric Company which, in addition to Price River Coal Company, owns:
  - Blackhawk Coal Company
- Kentucky Power Company
- Kingsport Power Company
- Michigan Electric Power Company
- Michigan Power Company which owns:
  - Michigan Gas Exploration Company
- Ohio Power Company which, in addition to Central Ohio Coal Company, Southern Ohio Coal Company, and Windsor Power House Coal Company, owns (partially):
  - Beech Bottom Power Company, Inc.
  - Cardinal Operating Company
  - Central Coal Company
  - Central Operating Company
- Ohio Valley Electric Corporation (partially owned) which owns:
  - Indiana-Kentucky Electric Corporation
- Twin Branch Railroad Company
- Wheeling Electric Company

## APPENDIX D

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# UNITED STATES
# DEPARTMENT OF LABOR
# MINE SAFETY AND HEALTH ADMINISTRATION

## Coal Mine Health and Safety Manual
## For Orders, Citations and Report Writing

March 9, 1978

## CHAPTER 1

• • •

### 8.0 INSPECTION ACTIVITY CODES

The Citation and Order Forms require the alphabetic code for the type of inspection on each citation and order issued. The following activity codes provide you with the appropriate information:

| I. MANDATORY INSPECTIONS AND INVESTIGATIONS | |
|---|---|
| *Title* | *Descriptions* |
| (1) Safety & Health Inspections of entire mine, surface facility, or other entity with a separate I. D. Number. | |

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| AAA - Safety & Health Inspection | Regular inspection of entire mine. This inspection shall cover the entire underground mine and its surface facilities and at a surface mine it includes the entire surface mine and its surface facilities |
| AAB - Safety & Health (Saturation) Inspection | Regular inspection conducted by a team of inspectors. If a saturation inspection is part of or results in a regular inspection, it shall be reported under this code. |
| (2) Safety & Health 103(i) Spot Inspection of any area of a mine, surface facility or other entity. | |
| ABA - 103(i) Spot (Ignition or Explosion) Inspection | Spot inspection at a mine classified as having had an ignition or explosions which resulted in death or serious injury within the past five years. |
| ABB - 103(i) Spot (Hazard) Inspection | Spot inspection at a mine where there exists other especially hazardous conditions. |
| ABC - 103(i) Spot (5-day) Inspection | Spot inspection at a mine which liberates more than one million cubic feet of methane or other explosive gases during a 24-hour period. |

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| ABD - 103(i) Spot (10-day) Inspection | Spot inspection at a mine which liberates more than 500,000 but less than one million one cubic feet of methane or other explosive gases during a 24-hour period. |
| ABE - 103(i) Spot (15-day) Inspection | Spot inspection of a mine which liberates more than 200,000 but less than 500,001 cubic feet of methane or other explosive gases in a 24-hour period. |
| (3) Safety & Health (Reopening) Inspection | |
| ACA - Reopening Inspection | Inspection of an entire mine when reopened after having been abandoned or declared inactive. |
| (4) 103(g) Spot Inspections | |
| ADA - 103(g)(1) Spot Inspection | Spot inspection resulting from a written complaint from a representative of miners or a miner. |
| ADB - 103(g)(1) Spot UM WA Inspection | Spot inspection resulting from a written complaint involving a safety or health dispute under National Bituminous Coal Wage Agreement or Anthracite Wage Agreement. |
| ADC - 103(g)(2) Spot Inspection | To be developed by the Secretary at a later date. |

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| (4) Safety & Health Technical Investigations | |
| AEA - Toxic Substance or Harmful Physical Agent Investigation | Investigation of a reported problem or potential problem with any toxic substance or harmful physical agent. |
| AEB - Section 101(c) Petition Investigation | Investigation pertaining to a request for modification of a mandatory safety standard. |
| AEC - Section 101(d) Petition Investigation | Investigation of activities pertaining to a person who may be adversely affected by a mandatory health or safety standard promulgated under this section. |
| (5) Safety & Health (Accident) Investigations | |
| AFA - Fatal Accident Investigation | Investigation of a fatal accident. |
| AFB - Nonfatal Injury Accident | Investigation of an accident where a nonfatal injury occurred. |
| AFC - Non Injury Accident investigation | Investigation of an accident where no injury occurred. |
| (6) Safety & Health (Special Investigator) Investigations | |
| AGA - Special Investigator Investigation | Investigation by a Special Investigator or his alternative who accompanies investigation teams. |

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| AGB - Special Investigator Willful Violation Investigation | Investigation of citations and orders where there is willful intent. |
| AGC - Special Investigator Discrimination Investigation | Investigation of a discrimination complaint submitted to MSHA. |
| II. POLICY INSPECTIONS AND INVESTIGATIONS (1) Safety & Health (MSHA) Policy Inspections | |
| BAA - Ventilation (Saturation) Inspections | Simultaneous inspection of all or parts of a mine by a team of ventilation specialists and/or regular inspection personnel. Record the area or areas inspected under item V on form 2000-22. |
| BAB - Respirable Dust Technical Inspection | Inspection of an *underground* mine where full-shift samples are collected to evaluate the dust control plan. Record the area or areas inspected under item V on form 2000-22. |
| PAC - Shaft, Slope, or Major Construction Spot Inspection | Spot inspection made of shaft, slope, or major construction sites to determine whether an imminent danger exists and whether there is compliance with safety and health standards or any citations or order issued. |

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| BAD - Code-A-Phone Spot Inspection | Spot inspection resulting from a code-a-phone complaint. |
| (2) Safety & Health (MHSA) Policy Investigations | |
| BBA - Electrical Investigation | An investigation concerning an indepth study of any electrical components and/or systems. Includes field changes on electrical face equipment, electrical activities prior to opening a new mine or the reopening of an inactive or abandoned mine, trolley surveys, circuit breaker studies, ground monitor checks, and other special electrical investigations. |
| BBB - Noise Technical Investigation | Investigation concerning the operator's noise program. Includes all supplemental noise level surveys. |
| BBC - Other Special Investigator Investigation | Investigation made when requested, that is not related to any violation or active case. |
| BBD - Mine Profile Investigation | A mine audit under the profile rating system guidelines. |
| BBE - ATF Technical Investigation | Investigation made for manufacturers, dealers, or user permits or license; any special investigation made for ATF compliance or problems where |

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| | it is suspected that explosives are involved. Routine inspections of explosive facilities shall not be included under this title. |
| III. AUXILIARY INSPECTIONS AND INVESTIGATIONS AND POLICY REQUIREMENTS. | (Activities supportive to mandatory) |
| (1) Safety and Health Spot Inspections | |
| CAA - Spot Inspection | Spot inspection at a mine to determine whether an imminent danger exists, and whether there is compliance with safety and health standard or with any citation or order issued. |
| CAB - Saturation Spot Inspection | Spot inspection conducted by a team of inspectors of an area(s) at a problem mine, or other mine so designated by the District or Subdistrict Manager. |
| (2) Safety & Health Electrical Inspections | |
| CBA - Electrical Inspection | An electrical inspection of an entire mine. |
| CBB - Electrical Saturation Inspection | Inspection conducted by a team of inspectors of area(s) of a mine. |

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| CBC - Electrical Spot Inspection | Spot inspection of a mine's electrical system. |
| (3) Safety & Health Technical Inspections | |
| CCA - Roof Control Technical Inspection | Inspection of roof conditions for plan evaluation and compliance conducted by a specialist. |
| CCB - Haulage Technical Inspection | Inspection of a haulage system. A haulage inspection which is part of a regular inspection shall not be reported under this code. |
| CCC - Ventilation Technical Inspection | Air quality surveys which are not a detailed engineering study of a mine ventilation system and inspections for ventilation plan evaluations and compliance are reported under this code. |
| CCD - Noise Technical Inspection | Inspection for noise plan evaluation. Noise complaints and supplemental noise level surveys shall not be reported under this code but should be reported under the technical investigation title (Code BBB). |
| CCE - Water Sediment or Slurry Impoundment Technical Inspection | Inspection of impoundments made by a specialist. An impoundment inspected as part of a regular inspection shall not be reported under this code. |

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| CCF - Waste Pile Technical Inspection | Inspection of a waste pile made by a specialist. A waste pile inspected as part of a regular inspection shall not be reported under this code. |
| (4) Safety & Health Hazards Analysis Accident Prevention Inspections | |
| CDA - HAAP Inspection | Routine inspection made by HAAP inspectors. |
| (5) Safety & Health Technical Investigations | |
| CEA - Roof Control Technical Investigation | Engineering or in-depth study of a roof problem or potential roof problem in a mine. Includes roof control surveys, pull tests, etc. |
| CEB - Haulage Technical Investigation | Investigation of haulage activities. Includes haulage activities such as surveys and investigations for clearance waivers, etc. |
| CEC - Ventilation Technical Investigation | Detailed engineering study of ventilation problems or potential ventilation problems. Includes ventilation surveys, investigations for waiver requests, etc. |
| CED - Respirable Dust Technical Inspection | Investigation concerning the operator sampling program where samples may or may not be collected. Includes investigations of 230(b) miners. |

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| CEE - Free Silica Technical Investigation | Investigation where additional respirable dust samples are collected for a free silica analysis. |
| CEF - Other Technical Investigation | Investigations not classified above. |
| (6) Safety & Health Other Activities. | |
| CFA - Mine Idle | Inspector attempting to make an inspection and finds mine idle. |
| CFB - ADP Contact | Mine visits involving the Automatic Data Processing System and the mine operator's respirable dust sampling program. |
| CFC - Other Contacts | Includes technical assistance visits for plan evaluations and other contacts not classified by one of the codes in this schedule. These are office visits not mine inspections or investigations. |

## APPENDIX E

[LETTERHEAD OF U.S. DEPARTMENT OF LABOR]

March 16, 1982 (SEAL)

MEMORANDUM FOR: AUREL GOODWIN
JOSEPH LAMONICA
MADISON McCULLOCH
HARRISON COMBS
JOHN ENGLISH
WAYNE VENEMAN
PAT SILVEY
CYNTHIA ATTWOOD

FROM: FORD B. FORD /s/ Ford B. Ford
Assistant Secretary for Mine Safety and Health

SUBJECT: Walkaround Compensation for "Spot Inspections"

The US. Court of Appeals for the District of Columbia Circuit recently issued a decision in *United Mine Workers of America* v. *Federal Mine Safety and Health Review Commission* (No. 79-2503 *et al.*), holding that, under Section 103(f) of the Mine Act, miners are entitled to participate in both "spot inspections" and "regular inspections" without suffering any loss of pay. This decision reverses the Federal Mine Safety and Health Review Commission's *Helen Mining Co.* (Docket No. PITT 79-11-P) and *Kentland-Elkhorn Coal Corp.* (Docket No. PIKE 78-399) decisions. As you know, following the Commission's decision in *Helen Mining and Kentland-Elkhorn*, my predecessor announced that until further notice MSHA inspectors should cease issuing citations if a mine operator refused to compensate the representative of miners for time spent during any inspection other than a "regular" inspection. Pending further consideration of this issue, we are now conforming our practices to the Court of Appeals' decision, and operators should be informed of their responsibilities regarding miner participation and compensation in light of that decision.

## APPENDIX F

Section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a):

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirement of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

# APPENDIX G

Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f):

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.